BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

TO THE

GOVERNOR OF THE STATE OF ALABAMA

FOR THE PERIOD

FROM OCTOBER 1, 1920 TO SEPTEMBER 30, 1922

J. Q. SMITH ..... Attorney General
(Resigned February 7, 1921)

HARWELL G. DAVIS ..... Attorney General
(Appointed February 7, 1921)

LAMAR FIELD ..... Special Assistant Attorney General

HENRY P. WHITE ..... Special Assistant Attorney General
(Resigned June 15, 1921)

HUGH WHITE ..... Special Assistant Attorney General
(Appointed March 1, 1921, resigned January 1, 1922)

MARION RUSHTON ..... Special Assistant Attorney General
(Appointed June 15, 1921; resigned September 30, 1922)

J. J. MAYFIELD ..... Special Assistant Attorney General
(Appointed January 1, 1922)

BERNICE SUMMERS OSGOODE ..... Special Assistant Attorney General
(Appointed October 7, 1920)

EDWINA FALKNER ..... Special Assistant Attorney General
(Appointed September 12, 1922)

MINNIE L. ANDERSON ..... Stenographer

BYRNIE WRIGHT ..... Stenographer

ATTORNEYS GENERAL OF ALABAMA

1819-1922

Henry Hitchcock	1819
Thomas White	1823
Constantine Perkins	1825
Peter Martin	1832
Alexander B. Meek	1836
John D. Phelan	1836
Lincoln Clarke	1838
Matthew W. Lindsay	1839
Thomas D. Clarke	1843
William H. Martin	1847
Marion A. Baldwin	1850
John W. A. Sanford	1865
Joshua Morse	1868
John W. A. Sanford	1870
Benjamin Gardner	1872
John W. A. Sanford	1874
Henry C. Tompkins	1878
Thomas N. McClellan	1884
William L. Martin	1889
William C. Fitts	1894
Charles G. Brown	1898
Massey Wilson	1903
Alexander M. Garber	1907
Robert C. Brickell	1911
William L. Martin, Jr.	1915
F. Loyd Tate	1918
Emmet S. Thigpen	1918
J. Q. Smith	1919
Harwell G. Davis	1921

Note: For many years, and until Feb. 20, 1866, the law required the Attorney General to act as solicitor for the circuit in which the seat of government was located.

LIST OF CIRCUIT JUDGES AND SOLICITORS

1st Circuit—Choctaw, Washington, and Clarke counties. Judge Ben D. Turner, Chatom; Solicitor F. E. Poole, Grove Hill.

2d Circuit—Butler, Crenshaw, and Lowndes counties. Judge A. E. Gamble, Greenville; Solicitor W. H. Stoddard, Luverne.

3d Circuit—Barbour, Bullock, Dale, and Russell counties. Judge J. S. Williams, Clayton; Solicitor T. M. Patterson, Clayton.

4th Circuit—Bibb, Dallas, Hale, Perry, and Wilcox counties. Judge S. F. Hobbs, Selma; Solicitor J. F. Thompson, Centreville.

5th Circuit—Chambers, Macon, Randolph, Tallapoosa, and Lee counties. Judges S. L. Brewer, Opelika, and Lum Duke, Opelika; Solicitors C. S. Moon, Lafayette, and C. A. L. Samford, Opelika.

6th Circuit—Tuscaloosa county. Judge Henry B. Foster, Tuscaloosa; Solicitor Edgar L. Clarkson, Tuscaloosa.

7th Circuit—Calhoun, Cleburne, and Talladega counties. Judge A. P. Agee, Anniston; Solicitor J. B. Sanford, Talladega.

8th Circuit—Cullman, Lawrence, Limestone, Madison, and Morgan counties. Judges R. C. Brickell, Huntsville, and Osceola Kyle, Decatur; Solicitor D. C. Almon, Albany.

9th Circuit—Cherokee, DeKalb, Marshall, and Jackson counties. Judge W. W. Haralson, Fort Payne; Solicitor A. E. Hawkins, Fort Payne.

10th Circuit—Jefferson county. Judges H. A. Locke, W. E. Fort, H. P. Heflin, Romaine Boyd, J. C. B. Gwin, C. B. Smith, J. Q. Smith, Richard V. Evans, D. A. Greene, J. B. Aird, Birmingham; Solicitor Joseph R. Tate, Birmingham; Deputy Solicitor Ben G. Perry, Bessemer.

11th Circuit—Colbert, Franklin, and Lauderdale counties. Judge Chas. P. Almon, Florence; Solicitor Henry D. Jones, Russellville.

12th Circuit—Coffee, Covington, and Pike counties. Judge A. B. Foster, Troy; Solicitor R. H. Jones, Andalusia.

13th Circuit—Mobile county. Judges Saffold Berney, J. W. Goldsby, and C. A. Grayson, Mobile; Solicitor Bart B. Chamberlain, Mobile.

14th Circuit—Walker, Winston, Fayette, Lamar, and Marion counties. Judges J. J. Curtis, Jasper, and T. L. Sowell, Jasper; Solicitor J. M. Pennington, Jasper.

15th Circuit—Montgomery county. Judges Leon McCord, Montgomery, and Walter B. Jones, Montgomery; Solicitor W. T. Seibels, Montgomery.

16th Circuit—Blount, Etowah, and St. Clair counties. Judges O. A. Steele, Oneonta, and Woodson J. Martin, Gadsden; Solicitor M. C. Sivley, Gadsden.

17th Circuit—Marengo, Greene, Pickens, and Sumter counties. Judge R. I. Jones, Linden; Solicitor B. G. Wilson, Demopolis.

18th Circuit—Clay, Shelby, and Coosa counties. Judge W. L. Longshore, Columbiana; Solicitor W. W. Wallace, Columbiana.

19th Circuit—Autauga, Chilton, and Elmore counties. Judge B. K. McMorris, Wetumpka; Solicitor C. E. Alexander, Prattville.

20th Circuit—Geneva, Henry, and Houston counties. Judge H. A. Pearce, Dothan; Solicitor J. N. Mullins, Hartford.

21st Circuit—Baldwin, Conecuh, Escambia, and Monroe counties. Judge John D. Leigh, Brewton; Solicitor G. O. Dickey, Evergreen.

LETTER OF TRANSMITTAL

Montgomery, Ala., October 1, 1922.

Hon. Thomas E. Kilby,
Governor of Alabama,
Capitol.

Dear Sir: Herewith is transmitted the biennial report of the Attorney General of Alabama for the period beginning October 1, 1920, and ending September 30, 1922. The Hon. J. Q. Smith served as Attorney General during the first of this period and until February 8, 1921. I was appointed on that date to fill the vacancy created by his resignation and have served for the remainder of the period.

A large number of written opinions were rendered by this office during the period covered by this report, but only those of general public interest have been included herein. During this period, the office has handled six hundred eighty-five criminal appeals and twenty-five civil appeals in the courts of last resort, besides representing the State's interest in the trial courts in over one hundred civil cases. The various statistics required by law have been included in the report. It will be noted that the solicitors' reports show fourteen thousand one hundred thirty-seven criminal cases disposed of during this time. This is three thousand five hundred thirty more cases than were disposed of during the preceding biennial period.

It is proper here to note that this report is not required to contain a record of all of the activities of the Attorney General and does not give an adequate idea of his duties and responsibilities. By constitutional provision, the Attorney General is a member of the Board of Pardons. The Indeterminate Sentence Law of 1919 requires the Board of Pardons to pass on all indeterminate sentences, and determine whether a convict should be released at the expiration of his minimum sentence or serve longer. During the last fiscal year the Board of Pardons considered four hundred fifty-six applications for parole and pardon, and two hundred ninety-five indeterminate sentences. In other words, the Board of Pardons passed on seven hundred fifty-one different matters, an average of over two each day.

The Attorney General is a member of the State Board of Compromise. This Board handles doubtful claims. Generally the doubtfulness of a claim is largely a legal question for the determination of the Attorney General. During the years 1921-1922 this Board has considered about one hundred matters, and has caused to be collected on its findings over twenty-six thousand dollars. This estimate does not include many cases where the principle announced in one matter applied to many similar matters, which would probably total several hundred thousand dollars.

The Attorney General is required to pass on the issuance of patents under the act approved September 25, 1915 (Acts 1915, page 719). In the last two years I have passed on sixty-two such applications, involving nine thousand five hundred fifty-four acres of land. This duty is both tedious and responsible, as it requires an investigation of the title to the land. As a member of the Board of Compromise of School Lands, I passed on seventy applications for patent, involving twenty-two hundred acres.

The Attorney General is a member of the State Bond Commission, empowered to issue and sell the twenty-five million dollars of highway bonds. There are many other duties, more or less important, required of the Attorney General, too numerous here to list. Attention has been directed to some of the most important.

While some of these duties such as the findings of the Pardon Board are contained in other reports, many of the duties required of the Attorney General are not required to be included in any report and therefore they have been enumerated here that attention might be directed to the fact that the duties of the office have been extended so as to require the performance of numerous important duties which are not included in the biennial report of this office.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

GENERAL STATEMENT

Showing Character and Results of Prosecutions in Each Judicial Circuit for Two Years Ending September 30, 1922

CRIMINAL APPEALS TO THE SUPREME COURT AND THE COURT OF APPEALS SINCE 1885

1885-86, 148 appeals 90 affirmed or dismissed, 58 reversed. Percentage of reversals, 39.

1887-88, 117 appeals, 72 affirmed or dismissed, 45 reversed. Percentage of reversals, 38.

1889-90, 189 appeals, 110 affirmed or dismissed, 79 reversed. Percentage of reversals, 42.

1891-92, 185 appeals, 112 affirmed or dismissed, 73 reversed. Percentage of reversals, 39.

1893-94, 230 appeals, 124 affirmed or dismissed, 106 reversed. Percentage of reversals, 46.

1895-96, 263 appeals, 158 affirmed or dismissed, 105 reversed. Percentage of reversals, 46.

1897-98 231 appeals, 150 affirmed or dismissed, 81 reversed. Percentage of reversals, 35.

1899-1900, 189 appeals, 134 affirmed or dismissed, 54 reversed. Percentage of reversals, 28.

1901-02, 225 appeals, 163 affirmed or dismissed, 30 reversed. Percentage of reversals, 28.

1903-04, 253 appeals, 164 affirmed or dismissed, 89 reversed. Percentage of reversals, 35.

1905-06, 292 appeals, 184 affirmed or dismissed, 108 reversed. Percentage of reversals, 36.

1907-08, 314 appeals, 209 affirmed or dismissed, 105 reversed. Percentage of reversals, 33.

1909-10, 280 appeals, 162 affirmed or dismissed, 124 reversed. Percentage of reversals, 43.

1911-12, 469 appeals, 335 affirmed or dismissed, 134 reversed. Percentage of reversals, 28.5.

1913-14, 579 appeals, 460 affirmed or dismissed, 119 reversed. Percentage of reversals, 20.5.

1915-16, 550 appeals, 457 affirmed or dismissed, 93 reversed. Percentage of reversals, 16.9.

1916-18, 506 appeals, 386 affirmed or dismissed, 120 reversed. Percentage of reversals, 23.7.

1918-20, 420 appeals, 291 affirmed or dismissed, 129 reversd. Percentage of reversals, 30.7.

1920-22, 685 appeals, 507 affirmed or dismissed, 178 reversed. Percentage of reversals, 25.9.

GENERAL SUMMARY OF CASES, 1920-22

Character of Offense.	Number Cases Disposed of.	Convictions	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Abandonment	39	18	8	12	2			3		12	5	5	6	4
Abduction	1			1										
Abortion, procuring	1			1										
Abusive language	418	209	27	161	21			8	1	166	25	7	137	28
Adultery	107	28	24	45	5			5	1	15	4	9	11	8
Affray	20	8	4	7	1					7	1	1	6	
Animals, injury to	47	18	9	15	4			1		13	4	5	8	10
Animals, failure to bury	2	2								2			2	
Arson, first degree	11	2	6	3			2				3	1		2
Arson, second degree	43	18	11	11	3		15	1			10	5	4	2
Arson, third degree	7	1	2	2	2			1		1	1	1	1	
Assault	65	44	9	9	1			11		31	8	3	23	5
Assault and battery	667	440	63	149	19			89	39	274	153	14	149	56
Assault to murder	351	148	73	129	27		120	19		14	88	27	33	22
Assault to rape	27	19	1	3	2		20				10	1	4	3
Assault to rob	16	7	3	6			7				2	3	3	
Assault with weapon	485	298	70	106	14		1	65	9	226	131	8	61	9

Auto law, violating	98	42	7	45	3			1	1	31	10	2	19	13
Bail, forfeiture	3	3								2			3	
Bastardy	70	27	10	22	10			2	1	15	8	2	14	5
Bestiality	1	1						1		1				
Bigamy	24	13		10	1		11	2			3		7	1
Blue sky law, violating	4	1		1	2					1			1	
Bribery	3			2	1									1
Burglary	832	525	95	151	38		394	116	5	15	293	49	95	39
Burning insured dwelling	3		1	2										
Carnal knowledge	44	20	9	12	2		19				9	5	8	2
Carrying concealed weapons	484	237	49	174	21		2	33	3	179	104	27	73	45
Checks, issuing worthless	65	23	2	33	7			4	3	16	4	1	15	2
Child labor law, violating	4	3		1										
Combination	11				11									
Conspiracy	7	2		6						2			2	
Contempt of court	7	6	1							6	1		4	
Contract, violating written	13	11		4	1					8	1	1	7	2
County, selling to	1		1											
Crime against nature	4	2			2		2				2			
Decoying child	5	1	1	3						1				3
Defacing building	12	3	1	7	1			1		2			1	
Defamation	16	4	3	7	2					4			4	
Discharging firearms	9	2	2	2	3					1	1			
Disturbing religious worship	88	40	18	29			3	7		25	6	7	34	14
Disturbing women in public place	14	12		2						12			8	

GENERAL SUMMARY OF CASES, 1920-22.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Dog tax, failure to pay	9	1		8						1		1		
Embezzlement	118	32	13	61	4		11	17	2	3	10	2	11	15
Escape	50	31	3	14	2		19	9		2	11	13	17	1
False pretense	215	71	27	86	11		22	19	5	29	30	13	26	31
Felony, attempt	41	28	6	5	1			8	4	19	1		6	
Felony, compounding	1		1											1
Fence, destroying	5	2	3							2	2			3
Food laws, violating	1		1											1
Forgery, first degree	166	64	14	76	10		49	12	3	3	25	5	23	50
Forgery, second degree	112	91	3	8	10		75	15	1		33	1	33	5
Forgery, third degree	6	6						1	2		1		4	
Game law, violating	36	14	3	19						10	1	2	9	3
Gaming	213	98	65	22	6			5	3	79	16	4	27	8
Gaming, permitting	3	1	1	1						1			1	1
Gaming table, keeping	8	2	1	1	2			1		1			1	
Health laws, violating	4	2		2										
Hunting without permit	5		3	1								1		2

Incest	19	8	2	8	1		7	1			1		5	3
Indecent exposure of person	1				1									
Indictment, revealing	1			1										
Larceny, grand	1142	628	125	267	96		543	200	2	1	309	58	119	48
Larceny, petit	565	457	32	52	6		1	191	56	244	224	17	113	16
License, doing business without	29	16		13				1	1	14	6		7	2
Liquors, condemnation	380	380												
Malicious mischief	22	9	3	8	2			3		8	1		8	3
Manslaughter, first degree	125	116	7	3			104	7		2	75	2	24	4
Manslaughter, second degree	49	30	11	6	2		1	14	5	12	7	2	8	1
Mayhem	3			3										
Medicine, practicing without certificate	17	5	2	5	5					5	2	1	3	1
Minors, selling to unlawfully	1			1										
Miscegenation	10	5	1	4			4	1		1	1	1	3	
Murder, first degree	326	159	91	71	7	22	122	3			86	32	31	45
Murder, second degree	139	83	32	17	1		82	1		3	34	6	29	10
Peace proceedings	10	1	2	7										
Perjury	26	3	1	16	4		3				2	1	3	6
Poison, putting out	2		2									1		1
Pool, permitting minor to play	10	3	2	4	1					3			2	2
Presenting gun	41	20	5	10	3			3		14	4	2	13	4
Profiteering	1	1								1				
Prohibition law, violating	2451	1198	314	855	77		23	283	8	864	319	73	375	184
Prohibition law, distilling	1516	897	236	298	89		637	98	11	171	306	86	445	191
Prohibition law, possessing still	128	80	25	20	2		59	20		1	34	4	30	15

GENERAL SUMMARY OF CASES, 1920-22.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Peniten-tiary.	Hard Labor.	Jail.		Convic-tions.	Acquittals.	Convic-tions.	Acquittals.
Property, injury to	33	8	4	21				1	4	2	1		3	5
Property, using without permission	39	33		5				9		23	11		16	1
Prostitution house, running	2	2							2	2				
Public drunkenness	260	153	17	76	6			2		130	15	4	110	30
Railroad, obstructing	3		2	1						1	1	1	1	
Rape	36	19	17	8		3	17				12		5	2
Removing land line	1	1								1			1	
Resisting officer	14	5	2	7				1	1	4	2		2	1
Revenue law, violating	71	35	7	26	2			2		14	4	1	10	3
Road law, violating	177	46	9	120	1		1	1	1	37	14	16	15	21
Road obstructing	6	2	2	2						1			1	2
Robbery	116	52	25	34	5	3	45				10	6	11	4
School law, violating	21	7	1	12	1					4			2	3
Seduction	52	10	4	25	4		7					2	8	8
Selling mortgaged property	107	42	22	45	3		6	8	2	17	8	7	21	13
Selling property under lien	15	7	1	7			4	2		1	5	1	2	2
Shooting across public road	27	14	4	8	1			1		13	4	1	10	6

Shooting into dwelling	5	1	1	2				1			1			3
Slander	3		1	2										1
Slot machine, operating	26	19	3	4						19			15	
Sodomy	3	1	1		1		1				1			
Soliciting labor	2			1	1									
Stock law, violating	33	21	3	10	1					18	1		4	2
Stolen property, bringing into state	2		1	1								1		1
Stolen property, buying, etc.	104	122	15	34	20		44	66	7	19	29	15	10	10
Sunday law, violating	56	31	8	14	3					27	3	1	19	12
Sunset law, violating	2	1		1						1			1	1
Threatening letter, sending	5	2	1	2				1		1	1	1	1	2
Tick law, violating	433	47	14	278	76					47		2	38	30
Trespass	79	25	21	26	7			4		17	5	3	15	10
Vagrancy	257	53	42	148	6			19	3	26	11	6	19	8
Vehicle tax, failure to pay	7	6	1	10						6			4	7
Voting, illegal	2		1		1									1
Wrecking trains	2	2					1	2			2			
Total	14137	7547	1777	4077	608	28	2484	1403	186	3001	2569	580	2463	1122

Percentage of convictions, 53.31. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF AUTAUGA COUNTY.

Cecil E. Alexander, Solicitor (19th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	1			1										
Adultery	1							1			1			
Assault to murder	5	3		2			3				3			
Assault with weapon	3	1	1	1							1	1		
Bigamy	1			1										
Burglary	5	2	2		1		2				2	1		1
Carrying concealed weapon	1	1								1	1			
Defamation	1			1										
False pretense	4		2	2								1		1
Felony, compounding	1		1											1
Forgery, first degree	1	1					1				1			
Forgery, second degree	2	2					2				1		1	
Incest	1		1											1
Larceny, grand	5	2	1	2			2				2			1
Larceny, petit	6	3	1	2						2	3	1		
Murder, second degree	1		1											1

Prohibition law, violating	4	4						3		1	4			
Prohibition law, distilling	25	21	2	2			11	1		9	16	1	5	1
Prohibition law, possessing still	1	1					1						1	
Resisting officer	1		1											1
Road law, violating	2			2										
Selling mortgaged property	1	1											1	
Trespass	3		1	1										1
Vehicle tax, failing to pay	1	1								1			1	
Totals	77	43	14	17	1		22	5		14	35	5	9	9

Percentage of convictions, 55.84. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BALDWIN COUNTY.

G. O. Dickey, Solicitor (21st Circuit).

Abusive language	4	4								4	1		3	
Adultery	2	1		1						1			1	
Animals, injury to	3	1	1	1						1			1	1
Assault and battery	1				1									
Assault to murder	1				1									
Assault with weapon	9	9						1	1	7	6		3	
Bail forfeiture	1	1											1	

CIRCUIT COURT OF BALDWIN COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Bigamy	1			1										
Burglary	2	2					2				2			
Carnal knowledge	1	1					1						1	
Carrying concealed weapon	2		2											2
Conspiracy	1	1								1			1	
Defamation	2	2								2			2	
Disturbing religious worship	1	1								1			1	
False pretense	2	1		1				1					1	
Forgery, first degree	1				1									
Forgery, second degree	1	1					1						1	
Forgery, third degree	1	1						1					1	
Game law, violating	4			4										
Gaming	3	3								3	3			
Hunting without permit	2		2											2
Larceny, grand	8	5	1	2			5				5			1
Larceny, petit	4	4						1		2	2		2	
License, doing business without	1			1										

Manslaughter, first degree	1	1					1				1			
Medicine, practicing without certificate	4		1		3									1
Murder, second degree	3	1	1				1						1	1
Presenting gun	1	1								1			1	
Prohibition law, violating	26	17	1	6	1			1		16	3		14	
Prohibition law, distilling	18	8		7	5		8				4		4	
Property, using without permission	2	2						1		1	1		1	
Public drunkenness	1	1								1			1	
Selling mortgaged property	2	1	1					1					1	1
Trespass	2	2						1		1			2	
Voting, illegal	1				1									
Totals	119	72	10	24	13		19	8	1	42	28		44	9

Percentage of convictions, 60.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BARBOUR COUNTY.
T. M. Patterson, Solicitor (3d Circuit).

Abandonment	1	1								1	1			
Abusive language	4	2	2							2			2	2
Adultery	1	1	1									1		
Animals, injury to	1	1	1											1

CIRCUIT COURT OF BARBOUR COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Peniten-tiary.	Hard Labor.	Jail.		Convic-tions.	Acquittals.	Convic-tions.	Acquittals.
Assault and battery	19	11	1	2				2		14	8		8	1
Assault to murder	5	4		1			4				4			
Bastardy	2	2								2	2			
Burglary	6	5	1	1			5				4	1	1	1
Carrying concealed weapons	7	5	4	2				1		4	5	1		2
Disturbing religious worship	6	1	3	2						1	1	1		2
Embezzlement	1			1										
Escape	1	1								1	1			
False pretense	2	1		1			1				1			
Forgery, second degree	2	2					2						2	
Gaming	10	9		1						6	8		1	
Larceny, grand	3	3					3				3			
Larceny, petit	2	2							1	2	2			
Manslaughter, first degree	2	1	1				1				1	1		
Murder, first degree	2	1		1								1		
Murder, second degree	1	1					1						1	
Prohibition law, violating	9	4	3	1				1		3	2	3	2	1

Prohibition law, distilling	20	10	6	4			10				6	4	4	1
Public drunkenness	1			1										
Revenue law, violating	1	1								1	1			
Selling mortgaged property	1			1										1
Selling property under lien	2	1	1				1				1	1	1	
Stolen property, buying, etc	1			1										
Totals	112	70	24	20			28	5	1	37	51	15	22	12

Percentage of convictions, 62.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BIBB COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Abusive language	1	1								1	1			
Assault to murder	2	1		1			1				1	1		
Assault with weapon	3	3						2		1	3			
Carrying concealed weapon	3	2		1				1		1	2	1		
False pretense	1	1					1						1	
Larceny, grand	5	5		1			1	3			4	1		
Larceny, petit	1	1						1					1	
Manslaughter, first degree	3	3					1	2			3			
Murder, first degree	7	4	3				4				4	2		1

CIRCUIT COURT OF BIBB COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Murder, second degree	1	1					1				1			
Prohibition law, violating	12	10	1	1				3		7	8	1	2	1
Prohibition law, distilling	7	5		1	1					5	1		4	2
Property, injury to	1	1						1			1			
Public drunkenness	1	1								1			1	
Rape	1	1				1					1			
Road law, violating	1		1									1		
Robbery	1	1				1					1			
Threatening letter, sending	1	1						1			1			
Tick law, violating	1			1										1
Totals	53	42	5	6	1	2	9	14		16	32	7	9	5

Percentage of convictions, 79.24. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BLOUNT COUNTY.

M. C. Sivley, Solicitor (16th Circuit).

Abandonment	1			1										
Abortion, procuring	1			1										
Abusive language	13	7	1	5				1		2			5	1
Adultery	2	1		1						1				1
Animals, injury to	3	2		1										1
Arson, second degree	1		1											
Assault and battery	28	14	2	11	1			1	5	4			7	3
Assault to murder	5	2	2	1			1	1			2			2
Assault to rape	1				1									1
Burglary	6	4		2			4				2		2	
Carnal knowledge	1			1										
Carrying concealed weapons	3	2		1						1			1	
Disturbing religious worship	3	1	2										1	2
Disturbing women in public place	1			1										
False pretense	2			2										
Larceny, grand	9		1	6										5
Larceny, petit	2	2						1		1			2	
License, doing business without	1			1										
Manslaughter, first degree	2	2					2						1	
Murder, first degree	1		1											
Prohibition law, violating	21	11	3	7						2			3	8
Prohibition law, distilling	21	15	1	5			12	5		5	1		9	3

CIRCUIT COURT OF BLOUNT COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Prohibition law, possessing still	1			1										1
Rape	1	1					1						1	
Public drunkenness	7	3		4						3			3	2
Road law, violating	2	1		1						1			1	
Seduction	1	1											1	
Stock law, violating	1	1											1	
Sunday law, violating	5	2	1	2						1			2	3
Tick law, violating	15			15										2
Trespass	1	1											1	
Vehicle tax, failure to pay	1	1								1			1	
Totals	276	74	15	70	2		20	9	5	22	5		42	34

Percentage of convictions, 26.81. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BULLOCK COUNTY.

T. M. Patterson, Solicitor (3d Circuit).

Assault	1		1									1		
Assault and battery	2	1	1					1			1	1		
Assault to murder	2	1	1					1			1	1		
Burglary	8	7	1				7	5			5	1	2	
Carrying concealed weapon	1	1						1			1			
False pretense	4	3		1			2			1	2		1	
Fence, destroying	1	1								1	1			
Forgery, second degree	3	3					3				2		1	
Game law, violating	2	1		1						1			1	
Larceny, grand	9	6	1	2			1	5			6	1		
Manslaughter, first degree	1	1					1				1			
Murder, first degree	1				1									
Murder, second degree	2	1	1				1				1	1		
Prohibition law, violating	3	1		1						1			1	
Prohibition law, distilling	13	9		4			7				7			2
Stolen property, bringing into state	1		1									1		
Stolen property, buying, etc.	1	1								1	1			
Threatening letter, sending	1		1									1		
Trespass	1	1								1	1			
Totals	57	38	8	9	1		22	13		6	30	8	6	2

Percentage of convictions, 66.66. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF BUTLER COUNTY.

W. H. Stoddard, Solicitor (2nd Circuit).

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	4	3		1						3			2	2
Assault and battery	1			1										1
Assault to murder	3	1	1	1			1						1	
Assault with weapon	2	2						1		1	2			
Burglary	9	6	2		1		4	2			5	1	1	1
Carnal knowledge	1	1					1						1	
Carrying concealed weapon	7	5		2				1		4	4		1	1
Check, issuing worthless	1	1						1			1			
Dog tax, failure to pay	1			1										
Forgery, first degree	1	1									1			
Larceny, grand	5	5		1			2	2			3	1		
Larceny, petit	8	7		1				2		5	6		1	
Manslaughter, first degree	1	1					1					1		
Murder, first degree	4	1	2	1		1					1			1
Murder, second degree	3	3					3				3			
Prohibition law, violating	16	6	6	4				1		5	3	2	3	7

Prohibition law, distilling	9	4	1	4				4			4	3		1
Prohibition law, possessing still	1	1						1			1			
Property, using without permission	5	5								5			5	
Road law, violating	1		1											1
School law, violating	1	1								1			1	
Shooting along public road	1	1								1			1	
Totals	85	55	13	17	1	1	12	15		25	34	8	17	15

Percentage of convictions, 64.7. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CALHOUN COUNTY.
J. B. Sanford, Solicitor (7th Circuit).

Abandonment	1	1								1	1			
Abusive language	2			2										
Arson, first degree	1			1										
Assault	3		1	3										1
Assault and battery	4	1		3						1			1	
Assault to murder	3	1		2			1				1			
Assault with weapon	7	3	2	2				3			3	1		1
Auto law, violating	1	1								1			1	
Bastardy	2	1			1								1	

CIRCUIT COURT OF CALHOUN COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Burglary	14	8	2	2	2		8				5	2	3	
Carnal knowledge	1	1											1	
Carrying concealed weapon	2	2						1		1			1	
Checks, issuing worthless	2	1		1						1			1	
Embezzlement	2		1	1										
Escape	1	1					1						1	
False pretense	5	4		1			4				3		1	
Forgery, first degree	4	2			2		2				1		1	
Larceny, grand	13	9		2	2		9				2	3	4	
Larceny, petit	8	7	1					1		5	4		3	1
Manslaughter, first degree	3	3					3				2		1	
Murder, first degree	4	3		1			3				1		2	
Murder, second degree	4	4					3	1			2		2	
Prohibition law, violating	42	16	11	6				8		15	5	2	20	6
Prohibition law, distilling	25	18	4	3			9	2		7	2		14	5
Public drunkenness	5	5								5	2		2	
Robbery	1	1					1				1			

Selling mortgaged property	6	1	1	4			1						1	1
Sunday law, violating	4	4								4			4	
Vagrancy	1			1										
Totals	171	98	23	35	7		45	16		41	35	8	65	15

Percentage of convictions, 57.30. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHAMBERS COUNTY.

Chas. S. Moon, Solicitor (5th Circuit).

Abusive language	3	2		1				1		1	2			
Assault	1	1						1			1			
Assault and battery	7	5	1	1				3		2		1		
Assault to murder	5	3	1	1			2				3	1		
Assault to rape	1	1					1							
Assault with weapon	3	3						2		1	3			
Auto law, violating	1			1										1
Bastardy	2	2									1		1	
Bigamy	1			1										
Burglary	8	4	1	3			4				4	1	1	
Carnal knowledge	1	1					1				1			
Carrying concealed weapon	2	1		1				1			1			
Disturbing religious worship	3	3											3	
False pretense	5		1	4								2		

CIRCUIT COURT OF CHAMBERS COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Forgery, first degree	1		1											1
Larceny, grand	4	2	1		1		2				2			
Larceny, petit	3	1	1	1				1		1				1
License, doing business without	1	1								1	1			
Manslaughter, first degree	3	3					2				1		2	
Murder, first degree	7	5		2		1	4				3			
Murder, second degree	1	1					1						1	
Prohibition law, violating	12	4	1	6	1			1			6		6	1
Prohibition law, distilling	85	43	7	25	1		43				23	2	8	
Public drunkenness	3	3						1		1	2		1	
Railroad, obstructing	1		1									1		
Seduction	1	1											1	
Selling mortgaged property	3	1	2	1								2		
Trespass	1	1												
Totals	169	92	18	48	3	1	60	11		7	54	10	24	4

Percentage of convictions, 54.43. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHEROKEE COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

Abusive language	2	1		1						1		1	1	
Carrying concealed weapon	1			1										1
Disturbing religious worship	2	2								2			2	
Gaming	2			2										2
Larceny, petit	1	1							1				1	
License, doing business without	1	1							1	1			1	
Murder, second degree	1	1					1						1	
Prohibition law, violating	4	3	1							2			3	1
Prohibition law, distilling	11	5	3	3			5				2	3	2	3
Public drunkenness	7	6		1						6			6	1
Road, obstructing	2	1	1							1			1	1
Shooting across public road	2		2											2
Threatening letter, sending	2			2										2
Totals	38	21	7	10			6		2	13	2	4	18	13

Percentage of convictions, 55.26. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHILTON COUNTY.

Cecil E. Alexander, Solicitor (19th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	1	1								1			1	
Adultery	1			1										
Assault and battery	2	2								2	1		1	
Assault to murder	1				1									
Bastardy	1	1						1					1	
Burglary	4	2	1	1			1	1			2	1		
Carnal knowledge	1		1											1
Carrying concealed weapon	2	1	1							1			1	1
Disturbing religious worship	1	1								1			1	
Forgery, first degree	1		1											1
Larceny, petit	2	2								2			2	
Manslaughter, first degree	1	1					1						1	
Murder, second degree	5		1	4										1
Perjury	1			1										
Prohibition law, violation	10	3	6				2			1			3	6
Prohibition law, distilling	8	6		1	1		1	1		4	3		3	

Public drunkenness	2	1		1						1			1	
Totals	44	21	11	9	2		5	3		13	6	1	15	10

Percentage of convictions, 47.72. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CHOCTAW COUNTY.
Frank E. Poole, Solicitor (1st Circuit).

Abusive language	3	2		1						2	2			1
Animals, injury to	3	2		1						2	1		1	1
Assault and battery	8	8								8	5		3	
Assault to murder	3	2		1			2				2			1
Assault to ravish	1	1					1				1			
Assault with weapon	3	3					1	1		1	2		1	1
Bastardy	2	1			1						1			1
Burglary	1	1		1						1		1		
Carrying concealed weapon	6	4	1	1						4	4	2		
False pretense	1	1		1								1		
Forgery, first degree	2				1							1		
Gaming	2	2								2	2			
Larceny, grand	2	2					1	1			2			
Larceny, petit	2	2		1						2	3			

CIRCUIT COURT OF CHOCTAW COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals
Manslaughter, second degree	2	2								2			2	
Murder, first degree	2	1	1				1				1	1		
Prohibition law, violating	9	5		3						5	5	2		
Prohibition law, distilling	7	3	2	2			3				3	3		1
Property, using without permission	2	2								2	1		1	
Public drunkenness	1	1								1			1	
Road law, violating	1	1	1									1		
Seduction	1			1										1
Shooting along public road	2	1		1						1	1	1		
Tick law, violating	19	1		4	14					1		1	1	17
Trespass	1	1		1								1		
Totals	88	53	6	19	16		9	2		35	36	16	11	25

Percentage of convictions, 60.22. Predominant crime, Violating Tick Law.

CIRCUIT COURT OF CLARKE COUNTY.

Frank E. Poole, Solicitor (1st Circuit).

Abusive language	8	4	3	1						4	3	3		2
Animals, injury to	5	1		4						1	1	3		1
Arson, second degree	1	1					1				1			
Assault and battery	7	7						1		6	5		2	
Assault to murder	1	1					1				1			
Assault to ravish	1	1					1						1	
Assault with weapon	2	1		1						1	1	1		
Burglary	3	3						3			3			
Carnal knowledge	1			1								1		
Carrying concealed weapon	5	4		1				1		3	3		1	1
Dog tax, failure to pay	1			1								1		
Embezzlement	1			1										1
False pretense	2	1		1						1	1	1		
Larceny, grand	5	2		2	1			2			4			1
Larceny, petit	10	8		2				2		6	7	1	1	1
Murder, first degree	3	1	1	1			1					1	1	1
Murder, second degree	1	1					1				1			
Prohibition law, violating	11	11								11	10		1	
Prohibition law, distilling	14	8		6			6				6	7		1
Public drunkenness	2	1	1	1						1	1	1		
Revenue law, violating	1	1								1			1	
Road law, violating	1			1								1		

CIRCUIT COURT OF CLARKE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Shooting along public road	1	1								1			1	
Tick law, violating	1			1								1		
Vehicle tax, failure to pay	6			6										6
Totals	94	58	5	31	1		11	9		36	48	22	9	15

Percentage of convictions, 61.70. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CLAY COUNTY.
W. W. Wallace, Solicitor (18th Circuit).

Abusive language	5	5								5			5	
Animals, injury to	1	1								1			1	
Assault	1	1								1			1	
Assault to murder	5	1	1	3			1					1		2

Assault with weapon	3	2		1						2			2	1
Bastardy	1	1								1			1	
Burglary	8	6	1	1			6				6	2		
Carnal knowledge	1			1										
Disturbing religious worship	1	1								1			1	
Escape	1	1					1				1			
Forgery, third degree	1	1							1				1	
Incest	1	1					1							
Larceny, grand	7	4		3			4				1		3	
Larceny, petit	10	8		2				4		4	2	1	6	1
Murder, first degree	4	4					4				1		1	
Prohibition law, violating	13	1		12						1		1	1	11
Prohibition law, distilling	7	5	1	1			4			1	1		3	1
Property, using without permission	1	1								1			1	
Public drunkenness	3	3								1			1	
Rape	1		1									1		
Robbery	1			1										
Totals	76	47	4	25			21	4	1	19	12	6	28	16

Percentage of convictions, 61.84. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CLEBURNE COUNTY.

J. B. Sanford, Solicitor (7th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	2	2								2			1	
Assault	3	3								3			3	
Assault and battery	1	1								1				
Assault to murder	2	2					2	1		1				
Assault with weapon	7	5	1	1				3		2				
Burglary	1	1					1							
Carrying concealed weapon	4	2		2				1		1				
Disturbing religious worship	4	3		1						3			3	
Escape	1	1						1					1	
Larceny, grand	1	1					1							
Larceny, petit	1	1								1				
Manslaughter, first degree	1		1											
Murder, second degree	1	1					1						1	
Prohibition law, violating	8	5		3						6			5	
Prohibition law, distilling	25	18	2	5			18				1		6	
Prohibition law, possessing still	8	3	2				3							

Public drunkenness	5	5								3				
Selling mortgaged property	1		1											
Trespass	2	1	1							1			1	
Totals	78	55	8	12			26	6		24	1		21	

Percentage of convictions, 70.51. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COFFEE COUNTY.

R. H. Jones, Solicitor (12th Circuit).

Abusive language	5	5								5			5	
Adultery	1			1										
Affray	2	2								2			2	
Animals, failure to bury	1	1								1			1	
Arson, second degree	3		2	1								1		1
Assault and battery	4	2		2						2			2	
Assault to murder	6	2	1	3			2						2	1
Assault to rape	2	2					2				2			
Assault with weapon	10	8	2							8	4	1	4	1
Auto law, violating	3		1	2										1
Bastardy	3	1		1	1			1			1			
Bigamy	1	1					1						1	

CIRCUIT COURT OF COFFEE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Burglary	4	1	2	1							1	1		1
Carnal knowledge	2	2					2						2	
Carrying concealed weapon	10	3	3	4						3	1	1	2	2
Conspiracy	1			1										
Disturbing religious worship	1			1										
Embezzlement	1	1					1				1			
False pretense	2	2					1			1			2	
Forgery, first degree	3	2		1			2				1		1	
Game law, violating	8	6	1	1						6			6	1
Gaming	1	1								1			1	
Larceny, grand	1	1					1						1	
Larceny, petit	7	7								7	5		2	
Malicious mischief	1	1								1			1	
Manslaughter, first degree	5	5					5				4		1	
Manslaughter, second degree	2	2						1		1	1		1	
Murder, first degree	2	2					2						2	
Murder, second degree	2	1	1				1						1	1

Presenting gun	1			1										
Prohibition law, violating	41	21	4	15			6	7		9	13		9	2
Prohibition law, distilling	3	3					3				3			
Property, using without permission	1	1						1			1			
Public drunkenness	4	1	1	2				1					1	1
Rape	3	2	1				2						2	1
Revenue law, violating	1	1								1	1			
Road law, violating	5	2		3						2			2	
Seduction	1				1									
Selling mortgaged property	2		1	1										1
Selling property under lien	1			1										
Shooting across public road	1	1						1					1	
Trespass	1	1								1			1	
Totals	159	95	20	42	2		32	12		51	39	4	53	14

Percentage of convictions, 59.81. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COLBERT COUNTY.

Henry D. Jones, Solicitor (11th Circuit).

Abandonment	1			1								1		
Adultery	3		2	1										1

CIRCUIT COURT OF COLBERT COUNTY.--Continued.

Character of Offense.	Number Cases Disposed of.	Convictions	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Animals, injury to	1	1								1	1			
Arson, second degree	1	1					1				1			
Assault	4	1	1	1						1			1	1
Assault and battery	3	2		1						1			1	1
Assault to murder	5	2	1	2			2						2	2
Assault with weapon	5	3		2				1		3	3			2
Bastardy	1			1								1		
Bribery	1			1										1
Burglary	16	12		4			12				4	2	5	
Carnal knowledge	1	1					1				1			
Carrying concealed weapons	5	1		4						1		1	1	3
Embezzlement	2			2										2
False pretense	12	4		7	1		2			2	3		1	7
Forgery, first degree	4	3			1		3				3			1
Game law, violating	6			6										
Gaming	2	2								2			2	
Larceny, grand	21	17		4			16		1		17			

Larceny, petit	2			2								2		
Murder, first degree	17	3	1	13			3					7	3	6
Murder, second degree	5	3	2				3						3	1
Pool, permitting minor to play	2		2											2
Prohibition law, violating	38	15	2	20				6		14	6	4	10	12
Prohibition law, distilling	24	14	2	7	1		14					1	15	6
Prohibition law, possessing still	2			2										2
Public drunkenness	1	1								1			1	
Resisting officer	1			1										
Revenue law, violating	1	1								1			1	
Road law, violating	1	1							1		1			
Seduction	5	1	1	3			1					1	1	2
Selling mortgaged property	5	1	1	3								3		
Stolen property, buying, etc.	4	1		2	1		1				1			
Tick law, violating	1			1										1
Vagrancy	3	1	1	1						1	1	1		
Totals	206	92	16	92	4		59	7	2	28	42	24	47	53

Percentage of convictions, 44.66. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CONECUH COUNTY.

G. O. Dickey, Solicitor (21st Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	4	2		2						2			2	
Assault	2	2								2			2	
Assault and battery	3	1		2						1			1	
Assault to murder	1			1										
Assault with weapon	9	6	1	2				1		5	5		1	1
Bail forfeiture	2	2								2			2	
Burglary	9	7		1	1		7				7			
Carrying concealed weapon	6	3		2	1			1		2	1		2	
Fence destroying	1		1											1
Forgery, third degree	1	1											1	
Game law, violating	4	2		2						2			2	
Larceny, grand	1	1					1				1			
Larceny, petit	4	3		1						3	2		1	
Manslaughter, first degree	1	1					1				1			
Murder, first degree	1	1					1				1			
Prohibition law, violating	2	2						1		1	2			

Prohibition law, distilling	13	10		1	2		10				9		1	
Road law, violating	2			2										
Slander	1		1											1
Sunday law, violating	5	5								5			5	
Tick law, violating	14	9		2	3					9			9	
Trespass	2	1	1										1	1
Vehicle tax, failure to pay	1		1											1
Totals	89	59	5	18	7		20	3		34	29		30	5

Percentage of convictions, 66.29. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COOSA COUNTY.

W. W. Wallace, Solicitor (18th Circuit).

Abusive language	1	1								1	1			
Affray	1	1								1	1			
Arson, first degree	1			1								1		
Assault to murder	3	3					3				2		1	
Assault with weapon	3	3						1		2	2		1	
Bastardy	1		1											1
Burglary	2	1	1				1				1	1		
Carrying concealed weapons	3	1		2				1			1			1

CIRCUIT COURT OF COOSA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Embezzlement	1			1										
Incest	1			1										
Larceny, grand	5	2		3			11				1		1	1
Larceny, petit	1	1								1			1	
Murder, first degree	5	4	1			1	3				4	1		
Prohibition law, violating	1	1						1			1			
Prohibition law, distilling	14	13		1			6			7	5		8	
Public drunkenness	2	2								2			2	
Road law, violating	3			3										2
Seduction	1	1					1						1	
Totals	49	34	3	12		1	25	3		10	18	3	15	5

Percentage of convictions, 69.38. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF COVINGTON COUNTY.

R. H. Jones, Solicitor (12th Circuit).

Abusive language	9	7		1	1			1		6			7	
Arson, second degree	4	1	1	2			1				1			1
Assault and battery	17	12	3	2				3		9	7	1	5	2
Assault to murder	3	1	1	1			1						1	1
Assault with weapon	4	4						2		2	2		2	
Burglary	3	1	2				1					1	1	1
Carrying concealed weapon	14	8	3	3				1		7	1		7	3
Checks, issuing worthless	6	4		2				1		3		1	3	
Escape	1	1						1			1			
False pretense	4	2		2						2		1	1	
Forgery, first degree	4	3	1				2	1					3	1
Forgery, second degree	2	2					2						2	
Indecent exposure of person	1				1									
Larceny, grand	8	4	2	2			3	1			2		2	2
Larceny, petit	4	4						2		2	2		2	
Malicious mischief	3	2	1							2			2	1
Manslaughter, first degree	4	3	1				3				3			1
Medicine, practicing without certificate	1	1								1			1	
Murder, first degree	2	1	1				1						1	1
Prohibition law, violating	48	25	10	12			5	6		14	7	1	18	9
Prohibition law, distilling	12	11	1				6	2		3	3	2	6	1
Public drunkenness	2	1			1					1			1	

CIRCUIT COURT OF COVINGTON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Road law, violating	1	1								1			1	
Robbery	1		1									1		
Seduction	1				1									
Selling mortgaged property	1	1								1			1	
Shooting across public road	1		1											1
Soliciting labor	1				1									
Tick law, violating	31	13	5	13						13			13	5
Totals	193	113	34	40	5		25	21		67	29	8	81	31

Percentage of convictions, 58.54. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CRENSHAW COUNTY.

W. H. Stoddard, Solicitor (2nd Circuit).

Abusive language	3	2		1						2			3	
Adultery	1	1								1			1	

Assault and battery	2	1		1				1						
Assault to murder	6	2	2	2			2				2			
Assault with weapon	2	2								3	2		1	
Carrying concealed weapon	4	1		3				1		1	1			
Defamation	2			2										
Disturbing religious worship	1			1										
False pretense	1			1										
Larceny, grand	1	1					1		1		2			
Larceny, petit	2	2						1		1	1		1	
Malicious mischief	1	1								3			3	
Manslaughter, first degree	1	1					1						1	
Manslaughter, second degree	1	1						1					1	
Miscegenation	1			1										
Murder, first degree	2		1	1										1
Murder, second degree	2		1	1										
Prohibition law, violating	26	12	2	11	1			9		12	6	2	6	
Prohibition law, distilling	13	6	4	2			1				5	2	1	1
Public drunkenness	1			1										
Resisting officer	1			1										
Road law, violating	1	1								1			1	
Shooting across public road	1	1								1	1			
Trespass	1			1										
Totals	77	35	9	30	1		5	13	1	25	20	4	19	2

Percentage of convictions, 45.45. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF CULLMAN COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	3	2	1							2			2	1
Adultery	4	2	1	1						2			2	2
Assault and battery	4	3		1						3			3	
Assault to rob	1		1									1		
Assault with weapon	6	2	2	2						2			2	3
Bastardy	2	1			1								1	
Burglary	4	2	1	1			2						2	2
Disturbing religious worship	1	1								1			1	
False pretense	2			1	1									
Forgery, first degree	1		1											1
Gaming	2	2								1			1	1
Incest	1	1					1						1	
Larceny, grand	3	1		2			1						1	
Larceny, petit	4	3		1					2	3			3	
Manslaughter, first degree	1			1					1					
Manslaughter, second degree	1	1											1	

Prohibition law, violating	23	17	4	2				9		9			15	8
Prohibition law, distilling	42	28	11	3			27	1		1			28	11
Prohibition law, possessing still	1	1								1			1	
Property, using without permission	1	1								1			1	
Public drunkenness	4	2		2						2			2	2
Robbery	1		1											1
Seduction	1	1					1						1	
Selling mortgaged property	2		1	1										1
Sunday law, violating	2			2										2
Trespass	1	1								1			1	
Vagrancy	3			3										2
Totals	121	73	24	23	2		22	10	3	29		1	69	37

Percentage of convictions, 60.3. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DALE COUNTY.

T. M. Patterson, Solicitor (3d Circuit).

Abusive language	2	2								2			2	
Arson, second degree	2	2					2						2	
Arson, third degree	1		1	1								1	1	
Assault and battery	16	15		1				2		13	5		10	
Assault to murder	4	2		2			2						1	
Burglary	5	5					1	2			3			

CIRCUIT COURT OF DALE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Carrying concealed weapon	1			1										
Embezzlement	1		1	1										1
False pretense	4	1	2	1						1	1			1
Fence, destroying	1		1											1
Incest	1			1										
Larceny, grand	2	1		1				1					1	
Larceny, petit	3	3						1		2	1		2	
License, doing business without	1	1								1			1	
Manslaughter, first degree	3	3					3				1		2	
Murder, first degree	3	2	1				2				1	1	2	
Murder, second degree	2	1	1				1					1	1	
Prohibition law, violating	11	7	1	3						7			7	1
Prohibition law, distilling	20	12	2	6			11			1	4		8	1
Property, injury to	1	1								1			1	
Public drunkenness	9	8	1							8	1		7	1
Rape	2						2				2			
Road law, violating	2			2			1				1			

Selling property under lien	1			1										
Stock law, violating	2	1	1	1						1			1	1
Vagrancy	2			2										
Totals	102	67	12	24			25	6		37	20	3	49	7

Percentage of convictions, 65.68. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DALLAS COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Animals, injury to	1		1											1
Assault and battery	2	2						1		1	2			
Assault to murder	3	3					2	1			3			
Assault to rape	1	1					1				1			
Assault with weapon	10	10						4		8	12			
Auto law, violating	1			1								1		
Burglary	27	24	3				12	12			23	3	1	1
Carrying concealed weapons	21	21						6		15	21			
Embezzlement	2		1	1							1			1
False pretense	4	1		4						1			1	4
Forgery, 1st degree	3	1	1	1			1				1	2		
Forgery, second degree	1	1					1				1			
Larceny, grand	12	10		1	1		3	7			9	1		
Larceny, petit	12	12						6		6	12			
License, doing business without	3	3						1		2			3	

CIRCUIT COURT OF DALLAS COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals	Convictions.	Acquittals.
Manslaughter, first degree	2	2					1	1			2			
Murder, first degree	4	2	2				1				1	1		
Murder, second degree	1	1					2				1	1		
Perjury	1	1					1				1	1		
Presenting gun	1	1						1			1	1		
Prohibition law, violating	63	56	1	6				15		41	43	7	3	
Prohibition law, distilling	27	22		3			7	15			20	5	2	
Prohibition law, possessing still	8	7	2				1	6			4		3	
Property, using without permission	2	2						2			2			
Public drunkenness	1	1											1	
Resisting officer	1	1						1			1			
Road law, violating	2	2								2	2			
Selling mortgaged property	1			1								1		
Stolen property, buying, etc.	5	5						3		2	5			
Trespass	1	1						1			1			
Totals	223	193	11	18	1		33	83		78	170	24	14	7

Percentage of convictions, 86.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF DEKALB COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

Assault	1	1											1	
Assault and battery	1			1										1
Assault to murder	1	1											1	
Bastardy	1				1									
Burglary	3		1	2										3
Carrying concealed weapons	1			1										1
Larceny, petit	2	1		1						1			1	1
Prohibition law, violating	2	1		1				1		1			1	1
Prohibition law, distilling	9	2	1	6									2	7
Prohibition law, possessing still	3	1		2			1						1	2
Public drunkenness	1	1												1
Stolen property, bringing into state	1			1										1
Totals	26	8	2	15	1		1	1		2			7	18

Percentage of convictions, 30.76. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ELMORE COUNTY.

Cecil E. Alexander, Solicitor (19th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	1	1								1			1	
Animals, injury to	1	1											1	
Assault and battery	6	5		1				1		5	5			
Assault to murder	2	1		1			1							
Assault with weapon	4	4						2		2	3		1	
Burglary	5	3	2				3				3	2		
Carrying concealed weapons	2	1	1							1		1	1	
Checks, issuing worthless	1			1										
Disturbing religious worship	1			1										
Embezzlement	2			2										
False pretense	1	1						1			1			
Larceny, grand	4	1	3				1				1	1		2
Larceny, petit	5	5						3		3	5			
Murder, first degree	7	3	3	1			3				2	1	1	2
Prohibition law, violating	5	3	1	1						2			3	1
Prohibition law, distilling	17	9	7	1			3			6	5	2	5	4

Property, using without permission	1	1							1	1				
Trespass	1		1								1			
Totals	66	39	18	9			11	7		21	26	8	13	9

Percentage of convictions, 59.09. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ESCAMBIA COUNTY.

G. O. Dickey, Solicitor (21st Circuit).

Abusive language	4	1		2	1					1			1	
Assault and battery	4		1	3								1		
Assault to murder	6			6										
Assault with weapon	21	16		5						16	10		6	
Burglary	8	4		1	3		4				4			
Carnal knowledge	1	1					1				1			
Carrying concealed weapon	2			2										
Decoying child	1		1											1
Escape	1	1						1					1	
False pretense	1	1						1			1			
Forgery, second degree	1	1						1					1	
Larceny, grand	10	4	1	4	1		2	2			3		1	1
Larceny, petit	9	6		1	2			3		3	3		2	
Manslaughter, first degree	1	1					1						1	
Murder, second degree	3	2		1			2				2			

CIRCUIT COURT OF ESCAMBIA COUNTY.—Continued.

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Prohibition law, violating	21	10	4	6	1			2		8	9		1	4
Prohibition law, distilling	20	8	2	1	9		6	2			6	1	2	1
Rape	3	2	1				2				2	1		
Selling mortgaged property	2			2										
Trespass	4	3	1							3			3	1
Vehicle tax, failure to pay	2	2								2			2	
Totals	125	63	11	34	17		18	12		33	51	3	21	8

Percentage of convictions, 50.4. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ETOWAH COUNTY.

M. C. Sivley, Solicitor (16th Circuit).

Abusive language	10	6	1	3						6				
Adultery	2	2								2				
Affray	2			2										

Animals, injury to	1			1										
Assault and battery	28	18	2	8				6		14				
Assault to murder	3	2	1				1	1						
Assault with weapon	1	1						1						
Auto law, violating	1	1								1				
Burglary	8	7		1				7						
Carrying concealed weapons	4	4								4				
Checks, issuing worthless	1			1										
Defamation	2	1	1							1				
Disturbing religious worship	1	1								1				
False pretense	7	2		5				1	1					
Felony, attempt	5	5						2	3	2				
Forgery, first degree	7	2	1	4			1	1		1				
Gaming	5	5								5				
Hunting without permit	1		1											
Incest	1	1						1						
Indictment, revealing	1			1										
Larceny, grand	14	9	2	3			2	7						
Larceny, petit	7	6	1					5	1	1				
License, doing business without	1	1								1				
Murder, first degree	11	8	2	1		2	6				1		1	
Murder, second degree	1			1										
Prohibition law, violating	29	11	2	16				2	1	11				
Prohibition law, distilling	33	20	5	8			20							
Public drunkenness	1	1								1				

CIRCUIT COURT OF ETOWAH COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Road, obstructing	1		1											
Robbery	4	3	1				3							
Seduction	2			2										
Selling mortgaged property	2	1	1						1	1				
Shooting into dwelling	1			1										
Stock law, violating	7	2		5						2				
Trespass	2		1	1										
Totals	207	120	23	64		2	33	34	7	54	1		1	

Percentage of convictions, 57.97. Predominant crime. Violating Prohibition Law.

CIRCUIT COURT OF FAYETTE COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	19	14	2	3						6			14	
Assault and battery	7	5		1		1				3			6	

Adultery	1			1										
Bastardy	1	1								1			1	
Burglary	2	2					2						2	
Carrying concealed weapons	2	1		1						1			1	
Conspiracy	5			5										
False pretense	1				1									
Felony, attempt	7	4	1	2						4			4	
Larceny, petit	1			1										
License, doing business without	5	2		3						2			2	
Malicious mischief	2			2										
Murder, first degree	4	2	1	1			2						2	1
Presenting gun	2	2								2	1		1	
Prohibition law, violating	19	7	3	10						4	1		6	2
Prohibition law, distilling	23	11		4	8		1		1	5			11	
Public drunkenness	13	10		3						10			10	
Road law, violating	4		1	3										1
Seduction	12			3										
Selling mortgaged property	4	3		1						3			3	
Stock law, violating	2	1		1									1	
Trespass	2	2											2	
Totals	138	67	8	44	9	1	5		1	41	2		66	4

Percentage of convictions, 48.55. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF FRANKLIN COUNTY.

Henry D. Jones, Solicitor (11th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	5	2		3						1			2	
Adultery	1	1						1					1	
Arson, first degree	1		1											1
Assault with weapon	7	6		1				1		5			5	
Auto law, violating	2			2										
Burglary	3	2			1		3				2			
Carrying concealed weapon	11	4	3	4						4			6	
Disturbing religious worship	1			1										
Escape	1	1					1				1			
False pretense	1		1											1
Larceny, grand	2			2										
Larceny, petit	4	1		3					1	1			1	
Manslaughter, first degree	1	1					1						1	
Prohibition law, violating	9	5	2	2						4			5	2
Prohibition law, distilling	2	2	1				1						1	1
Property, injury to	1			1										

Public drunkenness	13	5		8						5			5	
Selling mortgaged property	1	1								1			1	
Stock law, violating	1		1											
Trespass	1	1								1			1	
Vagrancy	1			1										
Totals	69	32	9	28	1		6	2	1	22	3		29	5

Percentage of convictions, 46.37. Predominant crime, Public Drunkenness.

CIRCUIT COURT OF GENEVA COUNTY.

J. N. Mullins, Solicitor (20th Circuit).

Abandonment	2			1	1									1
Abusive language	4	2	1	1						2			2	1
Adultery	1			1										1
Animals, injury to	2		1	1										1
Arson, second degree	1	1					1						1	
Assault and battery	3	2		1				1		1	1		1	
Assault to murder	3	2		1			1						2	
Assault with weapon	1	1											1	
Bastardy	1		1											1
Bigamy	1			1										
Bribery	1			1										
Burglary	1	1					1						1	

CIRCUIT COURT OF GENEVA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Carrying concealed weapons	8	3	2	3						2	1		2	2
Checks, issuing worthless	1		1											1
Embezzlement	1			1										
False pretense	3		2	1										3
Food law, violating	1		1											1
Forgery, first degree	3			3										
Incest	2	1		1			1						1	
Larceny, grand	6	4		2			4				1		3	
Larceny, petit	5	4	1					1		3			3	1
Malicious mischief	1		1											1
Medicine, practicing without certificate	1			1										
Murder, first degree	5		2	3										4
Murder, second degree	3	2	1				2						1	
Presenting gun	1		1											1
Prohibition law, violating	18	9		9				3		6	1		7	4
Prohibition law, distilling	7	3		3	1		3						3	1
Prohibition law, possessing still	18	11	4	2	1		11				2	1	4	2

Public drunkenness	7	5	1	1						5	1		2	
Food law, violating	1			1										1
Seduction	1			1										
Selling mortgaged property	5		1	3										1
Selling property under lien	2			2										1
Shooting into dwelling	1			1										1
Stock law, violating	1	1											1	
Tick law, violating	7	2		5						2			2	
Trespass	1		1											1
Vagrancy	2		1	1										2
Totals	133	54	23	51	3		24	5		21	7	1	37	33

Percentage of convictions, 40.6. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF GREENE COUNTY.

B. G. Wilson, Solicitor (17th Circuit).

Abusive language	2	1		1						1	1			
Assault and battery	5	5								5	3			
Assault to murder	4	1	1	1	1		1							
Assault with weapon	7	6		1						6				1
Burglary	2	1	1				1				1			
Carrying concealed weapon	9	8		1				1		7	5		1	
Disturbing religious worship	1			1										

CIRCUIT COURT OF GREENE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Peniten-tiary.	Hard Labor.	Jail.		Negro.		White.	
													Convic-tions.	Acquittals
Dog tax, failure to pay	3	1		2						1				
False pretense	1	1								1				
Forgery, first degree	1			1										1
Larceny, grand	3	1		2			1				2			
Larceny, petit	9	9						2		7	9			
Manslaughter, first degree	1	1					1							
Miscegenation	1			1										
Murder, second degree	2	2					2						2	
Pool, permitting minor to play	1	1								1				
Prohibition law, violating	19	7		12						7	5			
Prohibition law, distilling	1	1					1							
Public drunkenness	1	1								1	1			
Road law, violating	37	15		22						15				
Soliciting labor	1			1										
Vagrancy	5			5								2		
Totals	116	62	2	51	1		7	3		52	27	2	3	2

Percentage of convictions, 53.44. Predominant crime, Violating Road Law.

CIRCUIT COURT OF HALE COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Abusive language	2			2									2
Arson, first degree	1	1					1			1			
Assault and battery	2	2							2	1		1	
Assault to murder	3	3					3			2		1	
Assault to rape	1			1							1		
Assault with weapon	11	11						2	9	11			
Burglary	2	2					2			2			
Carrying concealed weapon	7	6		2				1	4	5	2		
Disturbing religious worship	1	1							1	1			
Larceny, grand	7	7					4	3		5		2	
Larceny, petit	4	3	1					1	1	3	1		
Manslaughter, first degree	2	2					2			2			
Medicine, practicing without certificate	2	1	1						1	1	1		
Presenting gun	1			1									
Prohibition law, violating	8	7	1					2	5	7	1		
Prohibition law, distilling	6	2		4			1		1	2	4		
Prohibition law, possessing still	2	2					2			2			
Robbery	1	1					1			1			
Stock law, violating	1	1							1	1			
Stolen property, buying, etc.	2	2						1	1	2			
Vagrancy	1			1							1		
Totals	67	54	3	11			16	10	26	49	11	4	2

Percentage of convictions, 80.59. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF HENRY COUNTY.

J. N. Mullins, Solicitor (20th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Adultery	2		2									2		
Assault and battery	5	2	1	1						1			2	2
Assault to murder	8	6	1	1			2			4	5		2	
Assault to rape	1			1										
Bastardy	1			1										
Bigamy	1			1										
Burglary	4		2	2								2		2
Carrying concealed weapons	4	1	1	2						1			1	3
Disturbing religious worship	5	3		2						3		1	3	1
Larceny, grand	3	3						3			2		1	
Larceny, petit	4	2	1	1				1		1	2			2
Malicious mischief	1	1						1			1			
Murder, first degree	4	3	1								2		1	1
Prohibition law, violating	15	4	4	7						4	3		1	3
Prohibition law, distilling	1		1									1		
Prohibition law, possessing still	1	1					1				1			

Public drunkenness	5	3		1						2			3	2
Road law, violating	1			1										
Seduction	1		1									1		
Selling mortgaged property	3		1	2										3
Selling property under lien	1			1										
Shooting into dwelling	1		1											1
Totals	72	29	17	24			3	5		16	16	7	14	20

Percentage of convictions, 40.27. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF HOUSTON COUNTY.

J. N. Mullins, Solicitor (20th Circuit).

Abusive language	9	5		4						4			4	
Adultery	1		1									1		
Assault and battery	20	12	1	5						10	1	1	7	2
Assault to murder	17	8	2	7			2	1		4	4		3	2
Assault to rape	2	1	1				1				1			1
Bastardy	2				2									
Blue sky law, violating	1			1										
Burglary	18	10	1	7			10				5		1	2
Burning insured dwelling	1			1										
Carnal knowledge	1	1					1				1			
Carrying concealed weapon	9	4	1	4						3	2	2	1	1

CIRCUIT COURT OF HOUSTON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Disturbing religious worship	3	2	1										2	
Embezzlement	1			1										1
False pretense	6	2	1	3						1	1	1		2
Forgery, first degree	1	1					1						1	
Gaming	3	2		1									2	
Larceny, grand	16	8		9			8	1			3		6	3
Larceny, petit	16	13	2	1				1		9	3		7	1
Malicious mischief	1			1										
Manslaughter, first degree	5	5					5				5			
Murder, first degree	13	10	1	2			7	3			7		1	1
Murder, second degree	1	1					1						1	
Presenting gun	1	1											1	
Prohibition law, violating	44	17	2	25						8	2		12	4
Prohibition law, distilling	25	19	3	2			15			2	9		8	
Prohibition law, possessing still	41	27	9	5			27				7	2	17	4
Property, injury to	1	1											1	
Public drunkenness	7	4		3						1			4	1

Rape	1	1					1							
Road law, violating	26			26										
Seduction	1			1										1
Selling mortgaged property	4	1		3						1			1	
Selling property under lien	3	1		2			1						1	1
Shooting across public road	1			1										1
Stolen property, buying, etc.	5		1	4										3
Sunday law, violating	1		1									1		
Trespass	3			3										2
Vagrancy	1			1										
Totals	312	157	28	123	2		80	6		43	51	8	81	33

Percentage of convictions, 50.32. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF JACKSON COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

Abusive language	5	5								5			5	
Adultery	4	1		3				1				2	1	1
Arson, second degree	1		1											1
Assault	11	7	1	2	1			2		5	3	1	4	3
Assault to murder	4		4											4
Assault to rape	1			1										1
Bastardy	6	4	2							4	1	1	3	1

CIRCUIT COURT OF JACKSON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Burglary	20	13		7			12		1		5	1	8	6
Carrying concealed weapons	6	3								3	1		2	3
Disturbing religious worship	12	4	3	4			1	1		2		1	4	6
False pretense	2		1	1										1
Forgery, first degree	2			2										2
Incest	1	1					1						1	1
Larceny, grand	6	2	2	2			2				1	1	1	3
Larceny, petit	2	2						2					1	
License, doing business without	1			1										1
Manslaughter, first degree	2	2					2						2	
Murder, first degree	4	3	1			1	2				2		1	1
Murder, second degree	2	1	1				1						1	1
Perjury	2			1	1									2
Prohibition law, violating	37	16	5	15				11		6		1	16	20
Prohibition law, distilling	25	13	7	5			13						13	11
Prohibition law, possessing still	1	1					1						1	
Property, injury to	1			1										1

Property, using without permission	1			1										1
Public drunkenness	8	2	2	4						2			2	6
Removing land line	1	1								1			1	
Robbery	2			2										2
Selling mortgaged property	1	1					1						1	
Sunday law, violating	2	1		1						1			1	1
Tick law, violating	1	1								1			1	
Trespass	1		1									1		
Vagrancy	2	1		1						1	1			1
Totals	177	85	31	54	2	1	36	17	1	31	14	9	69	81

Percentage of convictions, 42.31. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF JEFFERSON COUNTY.

Joseph R. Tate, Solicitor (10th Circuit).

Abandonment	14	6	3	5	1			1		3				
Abusive language	112	18	6	75	13					1				
Adultery	47	8	12	22	5			1		2				
Affray	5		3	1	1									
Animals, injury to	8		1	3	4									
Arson, first degree	3		3											
Arson, second degree	14	3	5	3	3		1							
Arson, third degree	1			1										

CIRCUIT COURT OF JEFFERSON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals	Convictions.	Acquittals.
Assault	13	9	2	2				1		3				
Assault and battery	125	58	22	44	5			14	23	20				
Assault to murder	92	23	24	30	13	1	21	1						
Assault to rape	2	2					2							
Assault to rob	10	2	2	6			2							
Assault with weapon	189	52	57	68	12			8	6	29				
Auto law, violating	36	10	4	19	3					7				
Bastardy	21	3	1	12	2					1				
Bigamy	5	2		3			2							
Blackmail	1			1										
Blue sky law	2				2									
Burglary	204	103	37	51	5		80	20						
Burning insured dwelling	2	2	1											
Carnal knowledge	14	2	5	5	1		2							
Carrying concealed weapons	113	30	9	61	12			3	3	23				
Checks, issuing worthless	29	3	1	18	7			2		1				
Combination	11				11									

Contempt of court	2	1	1							1				
Defacing building	10	2	1	6	1					2				
Defamation	7		2	3	2									
Discharging firearms	7		2	2	3									
Disturbing religious worship	4	1	3							1				
Embezzlement	56	12	5	35	3		4	8						
Escape	5	1	3	1				1						
False pretense	43	6	9	4	5		1	5						
Felony, attempt	25	16	5	3	1			6	1	10				
Forgery, first degree	27	14	13				8	6						
Forgery, second degree	27	21	1	5			15	6						
Gaming	79	27	7	35	7			3	3	22				
Gaming table, keeping	5	1		2	2									
Health laws, violating	4	2		2										
Hunting without permit	1													
Incest	1		1											
Larceny, grand	457	169	74	152	51		106	62						
Larceny, petit	97	62	13	19	3			46	12	8				
License, doing business without	2	1		1						1				
Liquors, condemnation	380	380												
Malicious mischief	7	2	1	3	1			2						
Manslaughter, first degree	17	15	1	1			13	1						
Manslaughter, second degree	28	12	8	6	2		1	8	1	1				
Mayhem	3			3										
Miscegenation	1	1					1							

CIRCUIT COURT OF JEFFERSON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Murder, first degree	66	18	27	18		3	15							
Murder, second degree	40	16	14	5			17							
Peace proceedings	9	1	2	6										
Perjury	9		1	5	2									
Pool, permitting minor to play	2			2										
Presenting gun	10	1	1	4				1						
Profiteering	1	1								1				
Prohibition law, violating	977	421	118	405	40			60	4	361				
Prohibition law, distilling	223	73	61	31			17	8	2	32				
Property, injury to	20	3	2	15					4					
Property, using without permission	8	5		3				2		3				
Prostitution house, running	2	2							2	2				
Public drunkenness	26	8	3	11	3					8				
Rape	6	2	2	2			2							
Resisting officer	3			3										
Revenue law, violating	4			2	1									
Robbery	69	27	19	22	1	2	25							

School law, violating	3	2		1						2				
Seduction	5	1		2	2		1							
Selling mortgaged property	23	5	7	9	2			3						
Shooting across public road	1	1								1				
Slot machine, operating	6	3	3							3				
Sodomy	2		1	1										
Stolen property, buying, etc.	106	79	5	21	1		25	47	6	6				
Sunday law, violating	9	2	1	5	1					2				
Tick law, violating	266	9	7	222	20					9				
Trespass	27	2	8	10	7					2				
Vagrancy	190	19	34	120	15			12	1	6				
Totals	4481	1773	664	1638	226	6	361	338	65	543				

Percentage of convictions, 39.56. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LAMAR COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	5	1		3						2			2	
Assault and battery	1	1								1			1	
Carnal knowledge	1			1										
Carrying concealed weapon	8	4	1	3						4		1	4	
Defacing building	1			1										

CIRCUIT COURT OF LAMAR COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Peniten-tiary.	Hard Labor.	Jail.		Convic-tions.	Acquittals.	Convic-tions.	Acquittals.
Disturbing religious worship	1			1										
Felony, attempt	1	1								1			1	
Gaming	5	2		3						2	2			
Larceny, grand	1			1										
Larceny, petit	3	2		1					2	1	1		1	
Prohibition law, violating	6	3	3							3	2		1	3
Prohibition law, distilling	2	1	1				1			1			1	1
Public drunkenness	4	4								4			4	
School law, violating	1			1										
Selling mortgaged property	1		1											1
Shooting across public road	1	1								1			1	
Tick law, violating	1			1										
Totals	43	20	6	16			1		2	20	5	1	16	5

Percentage of convictions, 46.51. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LAUDERDALE COUNTY.

Henry D. Jones, Solicitor (11th Circuit).

Abusive language	7	3		3	1					1			3	
Adultery	2	1		1						1			1	
Arson, second degree	2			2										
Assault and battery	3	1		2									1	
Assault to murder	2			2										
Assault with weapon	8	5		2	1			1		4			1	
Burglary	7	4	1	6				1		2				
Carrying concealed weapon	5	2		2						3			2	
Disturbing religious worship	1		1											1
Embezzlement	2			2										
False pretense	1		1											
Forgery, first degree	2				2									
Game law, violating	1		1											
Gaming	2	2								2				
Gaming table, keeping	1		1											
Incest	1	1											1	
Larceny, grand	2			2						1				
Larceny, petit	1			1										
Manslaughter, first degree	2	2					2							
Murder, first degree	2	1			1									
Prohibition law, violating	16	10	4	3						10			3	
Prohibition law, distilling	4	2	1	1			2							

CIRCUIT COURT OF LAUDERDALE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Prohibition law, possessing still	3		1	2										
Public drunkenness	15	5	3	5	2					4			4	1
Seduction	1		1											1
Selling mortgaged property	4	2		2						2				
Stock law, violating	15	14		1						14				
Trespass	1			1										
Vagrancy	1			1										
Totals	110	54	14	41	7		4	2		44			15	3

Percentage of convictions, 49.09. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LAWRENCE COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Assault and battery	1	1						1			1			
Assault to murder	5	4	1				4				2		2	1
Burglary	9	8	1				8				5	1	2	1

Larceny, grand	3	3					3				1		2	
Larceny, petit	1	1							1				1	
Manslaughter, first degree	3	3					3				2		1	
Murder, first degree	3	3					3				2	1		
Murder, second degree	2	2					2				2			
Prohibition law, distilling	5	4		1			4						4	1
Stolen property, buying, etc.	1	1					1				1			
Totals	33	30	2	1			28	1	1		16	2	12	3

Percentage of convictions, 90.9. Predominant crime, Burglary.

CIRCUIT COURT OF LEE COUNTY.

C. A. L. Samford, Solicitor (5th Circuit).

Affray	2	1		1						1			1	
Arson, second degree	2	1	1				1				1			
Assault	5	5						2		3	5			
Assault and battery	3	3								3	1		1	
Assault to murder	6	5	1	3			3	2			5			
Auto law, violating	1	1								1	1			
Bigamy	3	3					2	1			2		1	
Burglary	20	18	2				15	5			18			
False pretense	6	3	1	2				2		1	1		2	
Fence, destroying	1	1								1	1			
Forgery, second degree	1			1										1

CIRCUIT COURT OF LEE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Larceny, grand	14	8		2	4		6	1			5		2	
Larceny, petit	5	4			1			1		3	4			
Manslaughter, first degree	2	2					2				1			1
Murder, first degree	4	1	2	2			1						1	1
Murder, second degree	2			1	1									
Presenting gun	1	1						1			1			
Prohibition law, violating	17	7		5			8	2		1	5		6	
Prohibition law, distilling	41	25	10	6			20	3		2	13	3	12	4
Selling property under lien	3	3					1		2		3			
Shooting across public road	2	2								2	1		1	1
Stolen property, buying, etc.	1	1								1			1	
Sunday law, violating	4		4											4
Sunset law, violating	2	1		1						1			1	1
Wrecking trains	1	1						1			1			
Totals	149	107	21	24	6		59	21	2	20	69	3	29	13

Percentage of convictions, 71.81. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF LIMESTONE COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Abusive language	14	5	2	6						5			5	7
Adultery	1			1										1
Arson, first degree	1		1											1
Assault and battery	2	2								2			2	
Assault to murder	1		1											1
Assault to rape	1	1					1				1			
Assault to rob	2	2					2				2			
Assault with weapon	13	12						2		11	3	1	9	
Burglary	15	15					15				10		5	
Carrying concealed weapon	12	6	1	5				1		4	2	3	3	2
Disturbing religious worship	8	4		4				3		1	3	4	1	
False pretense	2		1											2
Forgery, first degree	7	7					7				4		3	
Larceny, grand	7	7					7				2		5	
Larceny, petit	2	2							1	1			2	
Malicious mischief	1			1										1
Manslaughter, first degree	2	1	1				1				1			1
Manslaughter, second degree	1	1							1		1			
Murder, first degree	7	5	1			1	5				3		3	1
Presenting gun	3	3								3			3	
Prohibition law, violating	9	5	3		1					2			5	4
Prohibition law, distilling	10	7	2	1			7				1		6	3

CIRCUIT COURT OF LIMESTONE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Co...			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals.
Public drunkenness	9	3		2						2	1	2	2	
Rape	2	1	1				1						1	1
Road law, violating	21	6	3	12						3		2	4	15
Road, obstructing	1			1										1
School law, violating	3			3										3
Seduction	1			1										1
Selling mortgaged property	2	2								1			2	
Shooting across public road	2	2								2			2	
Vagrancy	2	1	1										1	1
Totals	165	100	18	37	1	1	46	6	2	37	34	12	64	46

Percentage of convictions, 60.6. Predominant crime, Violating Road Law.

CIRCUIT COURT OF LOWNDES COUNTY.

W. H. Stoddard, Solicitor (2nd Circuit).

Assault and battery	3	3								3	3			
Assault with weapon	3	3						3			3			
Burglary	1	1						1			1			
Carrying concealed weapon	1	1						1			1			
Contract, violating written	1	1								1	1			
Larceny, grand	1			1										
Larceny, petit	1	1								1			1	
Manslaughter, first degree	2	2					2				2			
Murder, second degree	1	1					1				1			
Prohibition law, violating	10	9		1				9			9			
Prohibition law, distilling	2	2						2			2			
Prohibition law, possessing a still	1	1					1				1			
Selling mortgaged property	1		1									1		
Selling property under lien	1	1								1	1			
Totals	29	26	1	2			4	16		6	25	1	1	

Percentage of convictions, 89.65. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MACON COUNTY.

Chas. S. Moon, Solicitor (5th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals	Convictions.	Acquittals.
Arson, first degree	1			1										
Assault to murder	5	4	1				4				4	1		1
Assault with weapon	3	3								3	3			
Burglary	4	2	1	1			2				2	1		
Carnal knowledge	1	1					1				1			
Carrying concealed weapon	2	1		1						1	1			
Larceny, grand	7	4	1				4				4	1		
Larceny, petit	3	3						3			3			
Manslaughter, first degree	2	2					2				2			
Miscegenation	1		1									1		
Murder, first degree	2	1	1				1				1			1
Prohibition law, violating	1			1										
Prohibition law, distilling	36	28	3	5			28				23	3	5	
Road law, violating	2		1	1								1		
Seduction	1	1												
Selling mortgaged property	1	1					1				1			
Totals	72	51	9	10			43	3		4	45	8	5	2

Percentage of convictions, 70.83. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MADISON COUNTY.
D. C. Almon, Solicitor (8th Circuit).

Abusive language	4	3		1						3			3	1
Assault	5	3	2							3		1	4	
Assault and battery	6	5	1							5			5	1
Assault to murder	3	3					3				1		2	
Assault with weapon	14	14						2		12	6	2	6	
Auto law, violating	18	11		7						10	4		7	7
Bastardy	1	1								1			1	
Bigamy	1	1					1						1	
Burglary	6	6					6				4		2	
Carrying concealed weapons	28	23	4	1						23	12	1	11	4
Checks, issuing worthless	2	2								2			2	
Embezzlement	1	1						1						
Escape	2	2					1			1			2	
False pretense	1	1					1						1	
Forgery, first degree	3	3					3				3			
Forgery, third degree	1	1									1			
Gaming	5	5								5			5	
Larceny, grand	15	14					14				12	1	2	
Larceny, petit	20	20						16		1	14		6	
Manslaughter, first degree	5	4	1				4				4		1	
Murder, first degree	4	1	3				1				1	1		2
Murder, second degree	4	4					4				4			

CIRCUIT COURT OF MADISON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Peniten-tiary.	Hard Labor.	Jail.		Convic-tions.	Acquittals.	Convic-tions.	Acquittals.
Prohibition law, violating	124	97	8	13				8		89	48	3	34	10
Prohibition law, distilling	18	14	4				14						14	4
Property, using without permission	4	4						1		3			4	
Public drunkenness	5	3	1	1						3	2		1	2
Revenue law, violating	4	4								4	1		3	
Robbery	1	1					1						1	
Selling mortgaged property	1	1								1			1	
Slander	2			2										
Slot machine, operating	15	15								15			15	
Stolen property, buying, etc.	2	1	1				1					1		
Vagrancy	9	9								9			9	
Voting illegally	1		1											1
Totals	335	277	26	25			54	28		190	117	10	143	32

Percentage of convictions, 82.68. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MARENGO COUNTY.

B. G. Wilson, Solicitor (17th Circuit).

Arson, third degree	1				1									
Assault and battery	4	3	1		1					3	1			
Assault to murder	5	3			2		2			1	2			
Assault with weapon	1	1								1				
Bastardy	1			1										
Burglary	7	4		3			4				2			
Carrying concealed weapon	3			3										
County, selling to	1		1											1
Decoying child	2	1		1						1				
Embezzlement	1		1											1
Escape	1			1										
False pretense	2	2						1		1				
Forgery, second degree	2	2					2						1	
Gaming	2	2								2				
Hunting without permit	1			1								1		
Larceny, grand	12	4	1	5	2		3	1			4			
Larceny, petit	9	6		3				1		5	3			
License, doing business without	4			4										
Manslaughter, first degree	1	1						1						
Manslaughter, second degree	1	1								1				
Murder, first degree	1			1										
Prohibition law, violating	11	7		4						7			2	

CIRCUIT COURT OF MARENGO COUNTY.—Continued.

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Prohibition law, distilling	7	4	2	1			1	2		1	1			
Prohibition law, possesssing still	2		1	1										
Property, using without permission	3	2		1				1		1	1		1	
Rape	1	1					1				1			
Road law, violating	3			3										
Slot machine, operating	1			1										
Vehicle tax, failure to pay	5	1		4						1				
Totals	95	45	7	38	6		13	7		25	15	1	4	2

Percentage of convictions, 47.36. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MARION COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abusive language	5	5								5			5	
Animals, injury to	2		1	1										1

Assault and battery	3	1	1	1						1			1	1
Assault to murder	2	2					2						2	
Assault with weapon	1	1								1			1	
Burglary	2				2									
Carnal knowledge	1	1					1						1	
Carrynig concealed weapons	2			2										
Disturbing religious worship	3	2		1						2			2	
False pretense	1			1										
Incest	1			1										
Larceny, petit	5	4	1							4			4	
Murder, first degree	1		1											1
Presenting gun	2	2								2			2	
Prohibition law, violation	15	5	4	6						5			5	4
Prohibition law, distilling	2	2								2			2	
Public drunkenness	11	9		2						8			9	
Robbery	2	1		1			1						1	
Tick law, violation	1			1										
Trespass	3		1	2										1
Totals	65	35	9	19	2		4			30			35	8

Percentage of convictions, 53.84. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MARSHALL COUNTY.

A. E. Hawkins, Solicitor (9th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abusive language	2	1		1						1				1
Animals, injury to	1	1								1				
Animals, failure to bury	1	1								1			1	
Assault	2	2								2			1	1
Assault and battery	8	5		3				1		4	1		4	
Assault to murder	4	1		3			1						1	
Burglary	2			2										
Carrying concealed weapons	7	2		5						2	1		1	1
Checks, issuing worthless	1	1								1			1	
Disturbing religious worship	3	1	1	1						1			1	1
False pretense	3	1		2			1						1	
Forgery, first degree	1		1											1
Gaming	2	2								2			2	
Larceny, grand	4		1	2	1									3
Larceny, petit	4	2	1	1				1	1	2			2	1
License, doing business without	1	1								1	1			
Murder, first degree	7	5		2	1		4				4			

Murder, second degree	3		3											3
Prohibition law, violating	23	5	4	11	2			2		4			4	7
Prohibition law, distilling	28	10	6	10	3		10						10	11
Property, injury to	4	2	1	1						1				3
Public drunkenness	11	5	3	3						5			4	5
Rape	1													
Shooting across public road	5	1		4						1			1	
Stock law, violating	1			1										
Tick law, violating	1			1										
Trespass	1	1								1				2
Vagrancy	2			2										
Totals	133	50	21	55	7		16	4	1	30	7		34	40

Percentage of convictions, 37.59. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MOBILE COUNTY.

Bart B. Chamberlain, Solicitor (13th Circuit).

Abusive language	13	9	3	1				1	1	7	3		6	3
Adultery	4				4									
Affray	2	1		1						1			1	
Animals, injury to	1		1									1		
Arson, first degree	1	1					1				1			
Assault and battery	69	56	4	5	4			25	5	16	28		28	4

CIRCUIT COURT OF MOBILE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Assault to murder	14	13			1		10	3			7		6	
Assault to rape	4	3			1		3				2		1	
Assault to rob	3	3					3						3	
Assault with weapon	3	2		1					2		2			
Auto law, violating	15	11		4				1	1	9	2		9	
Bastardy	2	1		1						1			1	
Burglary	52	48	4				39	9			35	1	13	3
Carnal knowledge	4	1	2		1		1				1	2		
Carrying concealed weapons	6	6			1					3	3		2	
Checks, issuing worthless	5	5							3	2	3		2	
Contempt of court	5	5								5	1		4	
Crime against nature	4	2			2		2				2			
Defamation	1	1								1			1	
Discharging firearms	1	1								1	1			
Disturbing women in public place	5	5								5			5	
Embezzlement	12	11		1			1	7	2	1	5		6	
Escape	3	3					1	2			2		1	
False pretense	4	3		1			1	2			2		1	

Forgery, first degree	1	1					1						1	
Forgery, second degree	53	43	1		9		37	6			28		15	1
Forgery, third degree	1	1							1				1	
Larceny, grand	110	80	9	1	20		55	25			57	2	23	7
Larceny, petit	39	38			1			34	4	3	28		10	
Malicious mischief	1	1								1			1	
Manslaughter, first degree	3	2	1				1	1			2			1
Manslaughter, second degree	1		1									1		
Miscegenation	2	2					2				1		1	
Murder, first degree	17	11	2	1	3	3	8				11			
Murder, second degree	5	5					5				4		1	
Peace proceedings	1			1										
Perjury	1	1					1						1	
Poison, putting out	1		1											1
Presenting gun	2				2									
Prohibition law, violating	96	40	13	22	21			24	1	15	12	2	28	11
Prohibition law, distilling	22	12	4	4	2		9	3			3		9	4
Prohibition law, possessing still	7	4	2		1		4				3		1	2
Property, using without permission	2	1								1			2	
Public drunkenness	3	1		2						1			1	
Rape	6	5		1		1	4				4		1	
Resisting officer	1			1										
Revenue law, violating	1		1											1
Robbery	16	9	1	3	3		9				1	1	8	
Selling mortgaged property	1	1									1			
Selling property under lien	1	1					1				1			

CIRCUIT COURT OF MOBILE COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Stolen property, buying, etc.	24	4	1	1	18		1	2	1	1	3	1	1	
Threatening letter, sending	1	1								1			1	
Tick law, violating	33	7		2	24					7			7	
Trespass	1			1										
Vagrancy	13	8		5				2	1	5	1		7	
Totals	699	470	51	60	118	4	200	147	22	87	258	11	200	40

Percentage of convictions, 67.23. Predominant crime, Larceny.

CIRCUIT COURT OF MONROE COUNTY.

G. O. Dickey, Solicitor (21st Circuit).

Abusive language	1			1										
Assault and battery	1			1										
Assault to murder	1	1					1				1			
Assault with weapon	12	9	1	2				2		7	6		3	

Bastardy	1	1											1	
Burglary	7	5		2			5				5			
Carrying concealed weapon	2	2								2	2			
Forgery, second degree	1	1					1						1	
Larceny, grand	10	5		4	1		5				5			
Larceny, petit	4	3	1							3	3	1		1
Manslaughter, first degree	1	1					1				1			
Manslaughter, second degree	1	1								1	1			
Medicine, practicing without license	7	2		3	2					2			2	
Murder, first degree	2		2											2
Murder, second degree	4	4					4			1	2		2	
Prohibition law, violating	20	10		10			1			10	10			
Prohibition law, distilling	18	1	1	10	6							1	1	
Property, injury to	1			1										
Robbery	2	2					2				2			
Shooting into dwelling	1													1
Sodomy	1	1					1				1			
Sunday law, violating	1	1								1	1			
Totals	99	50	5	34	9		21	2		27	40	2	10	4

Percentage of convictions, 50.5. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF MONTGOMERY COUNTY.

Wm. T. Seibels, Solicitor (15th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals	Convictions.	Acquittals
Abandonment	16	9	5	2				1		7	3	4	6	3
Abusive language	5	3		2						3	1	2	2	
Adultery	2	1		1								1	1	
Affray	1		1									1		
Animals, injury to	2	1		1				1					1	1
Arson, second degree	7	5		2			5				5	2		
Assault and battery	41	36	1	4				12	2	18	21	1	15	4
Assault to murder	28	8	8	12			4	4			6	18	2	2
Auto law, violating	7	3		4						3	2	1	1	3
Bigamy	3	2			1		1	1					2	1
Burglary	22	17	2	2	1		11	3		4	13	4	4	1
Carnal knowledge	7	5		2			5				3	2	2	
Carrying concealed weapons	19	10	3	5				1		8	4	7	5	3
Checks, issuing worthless	1			1										1
Contract, violating written	1			1								1		
Embezzlement	12	4	2	3	2		3	1			1	2	3	6

Escape	24	13	1	10			11	1				2	13	9
False pretense	14	6	3	5			4	2			2	4	5	3
Forgery, first degree	5	4	1				4					1	4	
Forgery, second degree	8	5		2	1		3	2				1	5	2
Game law, violating	3			3								1		2
Gaming	1			1										1
Gaming, permitting	1		1											1
Larceny, grand	184	125	28	25	6		66	59			83	42	38	17
Larceny, petit	34	30		4				10	2	18	20	3	8	2
License, doing business without	2	1		1						1	1			1
Manslaughter, first degree	6	6					5				3		2	
Manslaughter, second degree	1		1											1
Murder, first degree	19	14	5			4	10				14	2		3
Perjury	2			1	1									2
Presenting gun	3	1	2								1	1		1
Prohibition law, violating	63	41	3	19				14	1	26	17	10	24	12
Prohibition law, distilling	59	35	6	16	2		35				20	18	15	6
Public drunkenness	3			3										3
Rape	1	1					1				1			
Revenue law, violating	7	4		3						4		1	4	2
Road law, violating	4	3	1							3	1	1	2	
Robbery	6	3		3			3				3	2		1
Selling mortgaged property	8	6		2			1	3		1	5	2		1
Stolen property, buying, etc.	35	18	5	12			4	12		2	13	11	5	6
Sunday law, violating	1			1										2

CIRCUIT COURT OF MONTGOMERY COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Trespass	3		3									1		2
Vagrancy	4	3		1				2		1	2		1	1
Totals	675	423	82	154	14	4	176	129	5	99	245	149	170	106

Percentage of convictions, 62.66. Predominant crime, Grand Larceny.

CIRCUIT COURT OF MORGAN COUNTY.

D. C. Almon, Solicitor (8th Circuit).

Abusive language	15	3		12										
Adultery	11	3	1	7				1				1		
Affray	3	1		2										
Assault	1	1												
Assault and battery	12	5		7										
Assault to murder	1	1	1				1				1	1		
Assault with weapon	10	8		2				1		2	2		1	

Bigamy	1			1								1		
Burglary	16	14		2			14				9		5	1
Carrying concealed weapon	13	6	2	5										
Child labor law, violating	4	3		1										
Decoying child	2			2										2
Discharging firearms	1	1												
Disturbing religious worship	2		1	1										
Embezzlement	1		1											1
Escape	1	1					1				1			
False pretense	2	1		1										
Forgery, first degree	48	7	2	39			7				1		6	38
Game law, violating	4	4												
Gaming	22	7	1	14				2						
Incest	2	2					2						2	
Larceny, grand	16	14	2				13				11	1	3	1
Larceny, petit	10	9	1					2	3	6	3		4	
License, doing business without	1	1												
Manslaughter, first degree	4	4					4				3		1	
Manslaughter, second degree	2	2						2			1		1	
Murder, first degree	8	4	3	1			4				2	1	2	3
Pool, permitting minor to play	2			2										
Prohibition law, violating	58	24	10	24				2						
Prohibition law, distilling	14	8	2	3			8				2		6	6
Public drunkenness	7	4		3										
Resisting officer	1			1										

CIRCUIT COURT OF MORGAN COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Revenue law, violating	40	19	3	18										
Road law, violating	3	1		2										
Road, obstructing	1	1												
Robbery	2		2									2		
School law, violating	4	3	1											
Seduction	2	1		1			1						1	1
Selling mortgaged property	3	1		2										1
Stolen property, buying, etc.	5	4		1			3		1	1			3	1
Sunday law, violating	2	2												
Trespass	1													
Vagrancy	4	4	1											
Totals	362	174	34	154			58	10	4	9	36	7	35	55

Percentage of convictions, 48.06. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF PERRY COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Arson, first degree	1		1							1			
Arson, third degree	1				1				1				
Assault and battery	4	3		1					3	3			
Assault to murder	1			1									
Assault with weapon	1	1							1	1			
Burglary	2				2								2
Carrying concealed weapons	14	10	1	3			3		5	5	1	1	1
Embezzlement	1			1									1
False pretense	2			2					1				
Gaming	1			1									
Larceny, grand	4	4					3	1					
Larceny, petit	12	11	1					4	7	8	1		
Perjury	1	1					1			1			
Prohibition law, violating	21	16	2	6				10	3	10	4	3	1
Prohibition law, distilling	10	10	1	3			10	3		5	3		1
Prohibition law, possessing still	1	1					1						
Property, using without permission	1	1											
Public drunkenness	2	1		1					1			1	
Rape	1			1							1		
Road law, violating	8	5		3					4	4	3		
Selling mortgaged property	1	1							1				
Trespass	1	1							1				

CIRCUIT COURT OF PERRY COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Vagrancy	1			1								1		
Totals	92	65	6	24	3		15	21		28	38	14	5	6

Percentage of convictions, 70.65. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF PICKENS COUNTY.

B. G. Wilson, Solicitor (17th Circuit).

Abusive language	2	2								2			1	
Assault	4	4								4			2	
Assault and battery	6	6								6	2		1	
Assault to murder	2	2					2				2			
Assault with weapon	3	3								3	1			
Carrying concealed weapons	6	3		3						3	2			
Checks, issuing worthless	4	1		3						1			1	
Defacing building	1	1						1					1	

Dog tax, failure to pay	4			4										
Embezzlement	2	1		1						1				
Escape	1				1									
False pretense	1	1								1				
Felony, attempt	1	1								1			1	
Gaming	2			2										
Larceny, grand	2	1		1			1				1			
Larceny, petit	1	1								1				
Manslaughter, second degree	1	1						1						
Murder, first degree	1			1										
Murder, second degree	1	1					1							
Prohibition law, violating	15	5	3	8	1					3	2		2	
Prohibition law, distilling	8	5	2	1			3			2			2	
Prohibition law, possessing still	5	2	2	1			2							
Public drunkenness	1			1										
Rape	1			1										
Road law, violating	1				1									
Seduction	1			1										
Selling mortgaged property	1	1					1							
Stock law, violating	1				1									
Sunday law, violating	4	3			1					3				
Totals	83	45	7	28	5		10	2		31	10		11	

Percentage of convictions, 54.21. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF PIKE COUNTY.

R. H. Jones, Solicitor (12th Circuit).

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Abandonment	1			1										
Abusive language	1			1										
Assault and battery	10	5	2	3				1		4	2		3	2
Assault to murder	4	2	2				2				2			2
Assault with weapon	7	7						1		6	6		1	
Auto law, violating	1			1										
Bastardy	1			1										
Burglary	10	9			1		1	8			8		1	
Carrying concealed weapons	15	8	2	5				2		6	8	1		1
False pretense	3		1	2										1
Felony, attempt	1	1								1	1			
Fence, destroying	1		1											1
Forgery, second degree	1		1											1
Gaming	5	5								5			5	
Gaming table, keeping	1			1										
Larceny, grand	10	8			2		3	2			2		6	

Larceny, petit	15	14		1				5		9	10		4	
Malicious mischief	1	1								1			1	
Manslaughter, first degree	2	2					2				1		1	
Medicine, practicing without certificate	1			1										
Murder, first degree	1	1				1					1			
Murder, second degree	1	1					1						1	
Prohibition law, violating	44	15	8	21			1	5		9	10	4	5	4
Prohibition law, distilling	4	4					1	2		1	2		2	
Public drunkenness	4	3		1						3			3	
Road law, violating	1			1										
Robbery	1				1									
Seduction	1	1					1						1	
Selling mortgaged property	3	2		1						2			2	
Shooting across public roads	2	1		1						1			1	
Vagrancy	1	1								1	1			
Totals	154	91	17	42	4	1	12	26		49	54	5	37	12

Percentage of convictions, 59.09. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF RANDOLPH COUNTY.

Chas. S. Moon, Solicitor (5th Circuit).

Abusive language	5	4	1					2		2	1		1	
Animals, injury to	1	1								1				

CIRCUIT COURT OF RANDOLPH COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Assault	3	3						2		1	1		2	
Assault and battery	1			1										1
Assault to murder	3	1		2			1	1		1	1			
Assault to rape	1	1					1							
Assault with weapon	6	5	1					1		2	1		2	
Bastardy	2			2										
Burglary	5	3	2				3				1	1	2	
Carrying concealed weapons	3	2			1			2			1			
Disturbing religious worship	2			2										
False pretense	1	1		1										
Forgery, third degree	1	1												
Larceny, petit	8	7		1				3		4	3			
License, doing business without	1	1								1			1	
Murder, first degree	1			1										
Murder, second degree	3	3					3				1		2	
Perjury	2			2										
Presenting gun	1	1								1				

Prohibition law, violating	16	12	3	4				6	1	2				
Prohibition law, distilling	65	53	8	4			53					1		2
Public drunkenness	1			1										
Railroad, obstructing	1			1										
Rape	1	1												
Séduction	4			4										
Selling mortgaged property	1		1											
Sunday law, violating	2	2								2				
Totals	141	102	16	26	1		61	17	1	17	10	2	10	3

Percentage of convictions, 72.34. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF RUSSELL COUNTY.

T. M. Patterson, Solicitor (3d Circuit).

Adultery	2			1						1	1			
Animals, injury to	2		1							1	1			1
Arson, third degree	1			1										
Assault	1									1	1			
Assault and battery	23	18	4	1				6		12	16	3	1	2
Assault to murder	5	3	1	1			2				2		1	1
Assault to rape	1	1					1				1			
Bastardy	1	1								1	1			
Bigamy	1			1										

CIRCUIT COURT OF RUSSELL COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Burglary	23	21		2			19			2	17		2	
Carrying concealed weapons	8	4	2	2			2	1		2	5	1		
Checks, issuing worthless	1	1								1			1	
Disturbing religious worship	3	1	1	1			2				1		1	
Embezzlement	1	1								1	1		1	
False pretense	3	2	1				1			1	1	1	1	
Forgery, second degree	1	1					1				1			
Game law, violating	1	1								1	1			
Gaming	4	3		1						2		1	1	
Larceny, grand	10	9	1				8				7		1	1
Larceny, petit	9	5	3	1				1		4	5	2		1
License, doing busness without	3	2		1						2			2	
Manslaughter, first degree	6	6		1			5				4		1	
Medicine, practicing without certificate	1	1								1	1			
Murder, first degreee	4	1	2	1			1				1			1
Murder, second degree	4	2	1	1			2				1		1	1
Perjury	2		1	1										1

Presenting gun	1	1								1			1	
Prohibition law, violating	49	31	7	7				14		17	8	3	23	8
Prohibition law, distilling	36	25	5	1			25				19	3	5	7
Property, injury to	1		1											1
Railroad, obstructing	1	1								1			1	
Resisting officer	1	1								1	1			
Revenue law, violating	1	1						1			1			
Road law, violating	10			10										
Robbery	1	1					1						1	
Stolen property, buying, etc.	2	2								2	2			
Sunday law, violating	4	1		3						1	1			
Trespass	3	3						1		2	3			
Vagrancy	2	1	1							1		1	1	
Totals	232	152	37	38			70	24		59	104	15	46	25

Percentage of convictions, 65.56. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF SHELBY COUNTY.

W. W. Wallace, Solicitor (18th Circuit).

Abusive language	1	1								1			1	
Affray	1	1								1			1	
Assault and battery	6	4	1	1						4			4	1
Assault to murder	2	1		1			1				1			

CIRCUIT COURT OF SHELBY COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Bastardy	1		1											
Blue sky law, violating	1	1								1			1	
Burglary	7	5	1	1			5					1	5	
Carrying concealed weapons	3			3										2
Disturbing religious worship	1			1										
Escape	1		1											1
False pretense	2			2										
Forgery, first degree	3			3										3
Larceny, grand	13	9		4			8				7		1	
Larceny, petit	5	5						1	2	4	4		1	
Murder, first degree	10	7	2	1			7				5		1	2
Presenting gun	2			2										
Prohibition law, violating	11	2	1	8						2			2	4
Prohibition law, distilling	20	12	2	6			8			4	6	1	6	3
Property, using without permission	1	1								1	1			
Public drunkenness	4	2		2						2			2	1
Seduction	1		1											1

Selling mortgaged property	1	1					1						1	
Totals	97	52	10	35			30	1	2	20	24	2	26	18

Percentage of convictions, 53.59. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF ST. CLAIR COUNTY.

M. C. Sivley, Solicitor (16th Circuit).

Abandonment	1			1										
Abusive language	8	4		2	3					3			2	
Animals, injury to	1	1												
Arson, first degree	1		1											
Assault and battery	19	11	3	6	1				3	3				
Assault to murder	10	3	1	6			3							
Assault to rape	1	1					1							
Assault with weapon	1	1								1				
Auto law, violating	2	1	1											
Burglary	17	1	3	8	5		1							
Carrying concealed weapon	7	3		2	2					3				1
Disturbing religious worship	4	3	1					3					3	
Disturbing women in public place	1			1										
Escape	1		1											
False pretense	2			2										
Forgery, first degree	1							1						

CIRCUIT COURT OF ST. CLAIR COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Forgery, second degree	3	3					2		1					
Game law, violating	1			1										
Gaming	13	5		7	1					5	1	3	4	4
Incest	1			1										
Larceny, grand	6	2	3	1									1	
Larceny, petit	8	6		2						3				
Malicious mischief	2			1	1									
Minors, selling to unlawfully	1			1										
Murder, first degree	2			1	1									
Perjury	1			1										
Prohibition law, violation	27	11	7	9				5		4	3			4
Prohibition law, distilling	25	10	6	6	3		4			2				
Public drunkenness	3	2	1							2			1	
Rape	1		1											
Revenue law, violating	8	2	3	2	1					2				
Road law, violating	3			3										1
Road, obstructing	1			1										

School law, violating	7			6	1									
Seduction	1			1										
Selling mortgaged property	3	1		1	1				1				1	
Shooting across public road	1				1									
Stolen property, buying, etc.	1		1											
Sunday law, violating	1		1											
Tick law, violating	13		1	12										
Trespass	4		1	3										
Totals	214	71	36	88	21	11	9	5	28	4	3	12	10	

Percentage of convictions, 33.17. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF SUMTER COUNTY.

B. G. Wilson, Solicitor (17th Circuit).

Abusive language	1			1										
Arson, third degree	1		1											
Assault	2	1	1							1				
Assault and battery	1	1								1				
Assault to murder	2	1			1					1				
Assault with weapon	8	6	1	1				1		5	2		1	
Burglary	7	4		3		1	3				2			

CIRCUIT COURT OF SUMTER COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Carrying concealed weapon	10	7		3				6		4	1			
Escape	2	2						2			1		1	
False pretense	4	1		3						1				
Game law, violating	1			1										
Gaming	4			4										
Larceny, grand	5	3		2			1	2			2		1	
Larceny, petit	5	5								2	2			
Manslaughter, first degree	5	5					4	1			3			
Manslaughter, second degree	1	1								1				
Murder, first degree	1		1											
Murder, second degree	1			1										
Prohibition law, violating	9	4	1	4				1		3	4	1		
Prohibition law, distilling	14	10	1	3				8		4	8	1		
Prohibition law, possessing still	9	9					1	8			7			
Road law, violating	8			8										
Robbery	1			1										
Slot machine, operating	4	1		3						1				

Tick law, violating	2			2										
Vehicle tax, failing to pay	1	1								1				
Totals	109	57	6	40	1		7	32		25	32	2	3	

Percentage of convictions, 52.29. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF TALLADEGA COUNTY.

J. B. Sanford, Solicitor (7th Circuit).

Abusive language	1	1								1	1			
Assault to murder	3	1		2			1				1			
Assault to rape	1	1					1				1			
Assault with weapon	6	4	1	1				1		3	4		1	
Bastardy	3	1		2					1		1			
Bigamy	1	1					1						1	
Burglary	22	20	2				20				8		12	2
Carrying concealed weapons	4	3	1					1		2			1	1
Disturbing religious worship	2	2								2			2	
Embezzlement	2			2										
False pretense	2	1		1			1				1			
Forgery, first degree	2	2					2				1		1	
Forgery, second degree	1	1					1						1	

CIRCUIT COURT OF TALLADEGA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals	Convictions.	Acquittals.
Larceny, grand	4	4					4				1		3	
Larceny, petit	4	4						1		3	4			
Murder, first degree	5	5				1	4				4		1	
Prohibition law, violating	15	14		2				2		12	5		9	
Prohibition law, distilling	23	21	1	1			21				7	1	14	
Property, injury to	1			1										
Rape	1	1				1					1			
Seduction	1	1					1						1	
Shooting into dwelling	1	1						1			1			
Trespass	1	1						1					1	
Wrecking trains	1	1					1	1			1			
Totals	107	91	5	12		2	58	8	1	24	42	1	48	3

Percentage of convictions, 85.05. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF TALLAPOOSA COUNTY.

Chas. S. Moon, Solicitor (5th Circuit).

Animals, injury to	1	1								1			1	
Assault	1	1								1				
Assault and battery	5	3		2						3	2		1	
Assault to murder	3	1		2			1				1			
Assault to rape	2	2					2						2	
Assault with weapon	6	6		3				2		4	1			
Auto law, violating	1		1											1
Bastardy	2	2								1				
Bigamy	2	2					2						1	
Burglary	5	4		1			4						2	
Carnal knowledge	1		1									1		
Carrying concealed weapon	3	1		2						1			1	
False pretense	2				1								1	
Gaming	5		1	4										
Larceny, grand	6	1	1	2	2		1						1	
Larceny, petit	2	2								2	1		1	
Manslaughter, first degree	1	1					1						1	
Murder, first degree	1	1					1						1	
Murder, second degree	2	2					2						2	
Pool, permitting minor to play	3	2			1					2			2	
Presenting gun	1	1								1			1	
Prohibition law, violating	20	16	3	5	1		3	2		2	3		7	
Prohibition law, distilling	27	24	2	1			24				2	1	9	

CIRCUIT COURT OF TALLAPOOSA COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Resisting officer	1	1								1				
Revenue law, violating	1			1										
School law, violating	2	1		1						1			1	
Seduction	2			2										
Selling mortgaged property	3	1		2				1		1			1	
Stock law, violating	1		1											1
Sunday law, violating	8	7			1					7			7	
Trespass	1			1										
Vagrancy	3		1	2										
Totals	124	83	11	31	6		41	5		28	10	2	43	2

Percentage of convictions, 66.93. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF TUSCALOOSA COUNTY.

Edgar L. Clarkson, Solicitor (6th Circuit).

Abusive language	37	27	1	9				2		25	7		20	3
Adultery	7	5		2					1	3	2	1	3	

Animals, injury to	1			1								1		
Assault and battery	36	23	5	8				6	1	19	13	4	10	4
Assault to murder	14	9		3	2		7	2		1	9			
Assault with weapon	26	17		7				6		18	14		3	
Auto law, violating	5	1		4						1			1	
Bastardy	1	1								1			1	
Burglary	105	53	11	27	14		19	28	4	12	42	14	11	7
Carnal knowledge	2	1		1			1							1
Carrying concealed weapons	25	12		11	2					12	7	2	4	3
Checks, issuing worthless	10	4		6						4			4	
Conspiracy	1	1								1			1	
Contract law, violating	11	10		3	1					7			7	2
Defamation	1			1										1
Disturbing religious worship	1			1										1
Embezzlement	6	1		5			1							
Escape	2	2					2				2			
False pretense	31	12		15	1			4	4	12	7	3	5	3
Forgery, first degree	24	9	2	9	4		3	3	3	2	8	1	1	1
Gaming	2	2								2			2	
Gaming, permitting	2	1		1						1			1	
Gaming table, keeping	1	1						1		1			1	
Incest	3			2	1									1
Larceny, grand	4	4						4			4			
Larceny, petit	52	39	2	11				16	20	33	24	2	15	
Manslaughter, first degree	7	7					7				13		1	
Manslaughter, second degree	2	2							2	2			2	

CIRCUIT COURT OF TUSCALOOSA COUNTY.—Continued.

Character of Offense	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
						Death.	Penitentiary.	Hard Labor.	Jail.		Negro.		White.	
											Convictions.	Acquittals.	Convictions.	Acquittals
Miscegenation	3	1		2				1		1			1	
Murder, first degree	16	8	6	6			4				2	1	1	6
Murder, second degree	7	3	2	2			3				3			2
Perjury	3			3										2
Prohibition law, violating	77	44	7	45	3			13		44	29	7	21	8
Prohibition law, distilling	111	68	12	23	6		47	10	2	26	20	8	24	14
Property, using without permission	1	1								1			1	
Public drunkenness	17	15		2						15	4		11	
Rape	2			2										
Resisting officer	1	1							1	1			1	
Road law, violating	3	1		2						1	1		2	
Robbery	3	2		1							2			
Selling mortgaged property	2	1		6						1	1	1		1
Shooting across public road	3	1	1	1						1	1		1	1
Stolen property, buying, etc.	4	2		2								2		
Sunday law, violating	1	1								1	1			
Tick law, violating	8	5	1	2						5			5	1

Vagrancy	5	5					3		3	5			
Totals	686	403	50	226	34	94	99	38	257	221	47	161	62

Percentage of convictions, 58.74. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF WALKER COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abandonment	1	1					1						
Abusive language	18	12	2	2	2				12			2	1
Adultery	1	1							1				
Animals, injury to	2	2							2			1	
Arson, second degree	1			1									
Arson, third degree	1	1					1			1			
Assault	1			1									
Assault and battery	39	31	1	4	3				31	5		5	
Assault to murder	6	2	1	1	2	2			1				
Assault to rape	1	1				1							
Assault with weapon	7	5		1	1		1		5				
Auto law, violating	2	2							2				
Bestiality	1	1					1		1				
Bigamy	1	1				1							
Burglary	1	1				1							
Carrying concealed weapons	5	3		1	1				3				
Disturbing religious worship	2	1		1					1			1	
Disturbing women in public place	7	7							7			3	

CIRCUIT COURT OF WALKER COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
False pretense	1				1									
Forgery, first degree	2	1		1			1							
Forgery, second degree	2	2					2						2	
Gaming	5	5								5			1	
Larceny, grand	24	18		5	1		18			7	2		1	
Larceny, petit	21	19		2			1	1	2	19	1		1	
Manslaughter, first degree	2	2					2			2	1		1	
Manslaughter, second degree	2	2						1	1	2			1	
Murder, first degree	19	3	6	10			3					10	1	
Murder, second degree	5	3	1	1			3			2		1	2	
Presenting gun	1				1									
Prohibition law, violating	18	10	3	4	1			2		8			2	1
Prohibition law, distilling	18	15		3			1	3	5	15			1	
Public drunkenness	3	2		1						2				
Seduction	1			1										
Stolen property, buying, etc.	2	2					2			2	1			
Trespass	1			1										
Totals	224	156	14	41	13		38	11	8	130	11	11	25	2

Percentage of convictions, 69.64. Predominant crime, Larceny.

CIRCUIT COURT OF WASHINGTON COUNTY.

Frank E. Poole, Solicitor (1st Circuit).

Abusive language	7	6	1						6			5	1
Animals, injury to	2	1	1						1			1	
Arson, second degree	1	1					1			1			
Assault and battery	10	7	1	1					7	4	1	2	2
Assault with weapon	1	1					1					1	
Burglary	4	3		1		1	2			2			1
Carrying concealed weapons	5	5					1		4	1		4	
Embezzlement	1	1				1						1	
Forgery, second degree	1	1				1						1	
Game law, violating	1		1								1		
Larceny, grand	2	2				2						2	
Larceny, petit	5	2		2	1				2	2	1		3
Manslaughter, first degree	1	1				1						1	
Miscegenation	1	1				1						1	
Murder, first degree	1	1				1				1			
Murder, second degree	2	2				2				1		1	
Perjury	1			1									1
Presenting gun	1			1									1
Prohibition law, violating	3	2			1				2	1	1	1	
Prohibition law, distilling	3	2	1			1			1		1	2	
Property, using without permission	2	2							2			2	
Revenue law, violating	1	1					1					1	
Road law, violating	7			7							6		1

CIRCUIT COURT OF WASHINGTON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Shooting along public road	1	1								1			1	
Tick law, violating	8			8										3
Totals	79	43	5	28	2		10	6		26	13	17	27	19

Percentage of convictions, 54.43. Predominant crime, Assault and Battery.

CIRCUIT COURT OF WILCOX COUNTY.

J. F. Thompson, Solicitor (4th Circuit).

Arson, second degree	2	2					2				2			
Assault and battery	5	5						1		4	4		1	
Assault to murder	4	1	2		1		1				1	3		
Assault with weapon	11	8						4		8	10			
Auto law, violating	1										1			
Burglary	8	7		1			2	4			6	2		
Carrying concealed weapons	8	8						1		5	8			
False pretense	2			2										2
Larceny, grand	8	7		1			1	6			6			
Larceny, petit	9	8		1				4		4	8	1		
Manslaughter, first degree	4	4					4				4			

Manslaughter, second degree	2	1	1							1		1	1	
Murder, first degree	2	2				1	1				2			
Murder, second degree	4	4					4				4			
Poison, putting out	1		1									1		
Presenting gun	1	1								1			1	
Prohibition law, violating	19	14		4	3			12		2	14	7		
Prohibition law, distilling	15	11	2	3			4	7			11			
Prohibition law, possessing still	7	6		1			1	5			6	1		
Property, injury to	1			1										1
Property, using without permission	1	1						1			1			
Public drunkenness	3	2		1						2		1	2	
Road law, violating	5	5						1		4	4			
Totals	123	97	6	15	4	1	20	46		31	92	17	5	3

Percentage of convictions, 78.86. Predominant crime, Violating Prohibition Law.

CIRCUIT COURT OF WINSTON COUNTY.

J. M. Pennington, Solicitor (14th Circuit).

Abduction	1			1										
Abusive language	13	9		4						9			9	1
Adultery	2			2										1
Affray	1	1								1			1	
Assault and battery	7	4	1	2						5			7	1
Assault to murder	1			1										
Bastardy	3	1			2					1			1	1

CIRCUIT COURT OF WINSTON COUNTY.—Continued.

Character of Offense.	Number Cases Disposed of.	Convictions.	Acquittals.	Nolle Prosequies.	Abated or Withdrawn.	Number Sentences to				Fines Paid or Secured.	Color.			
											Negro.		White.	
						Death.	Penitentiary.	Hard Labor.	Jail.		Convictions.	Acquittals.	Convictions.	Acquittals.
Bribery	1				1									
Carrying concealed weapons	7	3		3	1					2			3	
Disturbing religious worship	2		1	1										1
Gaming	5			5										
Incest	1			1										
Larceny, petit	6	6								3			6	
Presenting gun	4	2	1	1						2			2	1
Prohibition law, violating	18	6	2	10						5			6	
Prohibition law, distilling	17	13	1	3				12	1	13			4	1
Prohibition law, possessing still	4	1	2	1			1						1	2
Public drunkenness	9	7		2						5			7	1
Resisting officer	2	1		1						1			1	
Road law, violating	4	1		2										1
Seduction	1			1										
Shooting across public road	3			3										1
Vagrancy	1			1										
Totals	113	55	8	45	4		1	12	1	47			48	12

Percentage of convictions, 39.82. Predominant crime, Violating Prohibition Law.

APPENDIX

OPINIONS

OF THE

ATTORNEY GENERAL

RELATING TO MATTERS OF PUBLIC INTEREST

OPINIONS OF THE ATTORNEY GENERAL

PUBLIC HIGHWAYS:—Bridge across Chattahoochee River would be outside State of Alabama, and Highway Department may not use funds for construction beyond State border.

October 4, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Ala.

Dear Sir:

The Attorney General has requested me to reply to your letter of the 29th ult., relating to the proposed construction of a bridge across the Chattahoochee River, so as to connect roads in the State of Georgia and Alabama at Phoenix, Ala.

Section 23 of the Highway Act, Acts 1919, p. 898, authorizes the construction of highways "to connect the county seats of the several border counties, at or near the State line, with a public road in the border states." This section is, in my judgment, sufficiently broad to authorize the construction of highways *up to the State line,* to connect with the highways of an adjoining state.

The general rule is that when two states are divided by a river, unless there be some law to the contrary, the boundary line between the two states is in the middle of the stream.

That rule does not apply, however, in this case, as the State of Georgia owns the entire bed of the stream and the State of Alabama only extends up to a line traced on the water line of the acclivity of the western bank and along that bank where that is defined, and in such places along the river where the western bank is not defined, it must be continued up the river on the line of its bed, as that is made by the average and mean stage of the water, as it runs under normal conditions without reference to extreme droughts, or extraordinary freshets of the winter or spring.

Alabama Code of 1907, Section 84.
Howard v. Ingersoll, 17 Ala. 780.
Howard v. Ingersoll, 14 (U. S.) Law Ed. 189.
Alabama v. Georgia, 16 (U. S.) Law Ed. 556.

Being of the opinion that there is no authority vested in the Highway Department for building roads outside of Alabama, and that the river bed is in the State of Georgia, I do not think the road authorities in Alabama can participate in the expense of building such bridge unless a portion of it will lie in the State of Alabama under the rule stated above; and I take it that the prosposed bridge will, when constructed, be entirely without the confines of the State of Alabama. If any part of the proposed bridge will fall within the boundary of Alabama as above outlined, then I think you could lawfully construct this portion or participate in the expense to that extent.

Yours truly,

LAMAR FIELD,
Assistant Attorney General.

JUDGE OF PROBATE:—Cannot delegate judicial acts to bonded clerk.

October 6, 1920.

Hon. B. T. Roberts,
Judge of Probate,
Clayton, Ala.

Dear Sir:

I beg to acknowledge receipt of your letter of October 4, in which you desire to be advised as to whether or not the bonded clerk in your office can lawfully sign a warrant of arrest of a party or sign your name thereto.

Section 6703 of the Code provides how the warrant shall be issued and signed, and the form is given for the warrant in Section 6704.

I am of the opinion that this is a judicial act, and cannot be delegated by you to any one.

Very truly,

J. Q. SMITH,
Attorney General.

CHAUFFEUR'S LICENSE:—Driving ambulance or auto-hearse for hire is "public use."

October 7, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You ask whether drivers of auto-hearses and ambulances, operated for hire, are subject to the chauffeur's license levied by Section 23, Acts 1911, p. 643, as amended by Acts 1919, page 1003.

Any exemption from such license must be found in the following provision of said section:

> "Provided, that the provisions of this section shall not apply to an owner of a motor vehicle for private use or any member of his family or other person authorized by him and otherwise qualified under the provisions of this Act; provided, that such owner shall be liable for any negligent or wilful injury inflicted by any such person authorized by him, but the same shall apply to the owner of the motor vehicle for public use."

The above provision is very awkwardly expressed, but I think the true meaning can be arrived at by transposing the last clause and eliminating the intervening proviso. The section then reads: "The provisions of this Section shall not apply to an owner of a motor vehicle for *private use,* etc., but the same shall apply to the owner of the motor vehicle for *public use.*"

The answer to your inquiry, therefore, depends on the proper distinction between "private use" and "public use," as these words are used in the statute. Giving to each expression its natural and legitimate meaning, I am convinced that the operation of an auto-hearse or ambulance for hire is a *"public use"* of such vehicle. The driver of such vehicle is, therefore, subject to the chauffeur's license.

Mills v. Conecuh County, 85 Sou. Rep. 564.
Montgomery v. Orpheum Taxi Co., 82 Sou. 117.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

ELECTIONS:—When general, special, and constitutional amendment elections are held on same date, separate ballot boxes are used.

Hon. W. W. Brandon, October 7, 1920.
Judge of Probate,
Tuscaloosa, Ala.

Dear Sir:

I beg to acknowledge receipt of your recent letter, in which you ask to be advised as to whether or not there will have to be separate ballot boxes used in the coming election.

I beg to refer you to Sections 332 and 333 of the Code of 1907, with reference to general elections. Also to Sections 439 to 445, inclusive, of the Code of 1907, regulating special elections. Also to Acts 1915, page 602, regulating elections on proposed amendments to the Constitution, and Acts 1915, page 364, regulating elections for United States senators.

From the several statutory provisions above referred to, it seems clear that there will be three distinct elections held on November 2, 1920; (1) the general election referred to in Sections 332 and 333 of the Code, for the purpose of electing all Federal, State, and county officers usually voted for at this time; (2) the special election for United States senator to fill the vacancy caused by the death of Senator Bankhead; (3) the vote on the several proposed amendments to the Constitution.

There must therefore be at least three separate ballot boxes furnished for each voting place. There may be as many as three ballot boxes, but not more, at each voting place, even where only one election is held. (Code of 1907, Section 346.)

Section 284 of the Constitution provides that if a proposed amendment is voted on the day of the general election, then "the officers of such general election shall open a poll for the vote of the qualified electors upon the proposed amendments." So the officers of the general election have charge of the vote on the proposed amendments, but a separate poll list, tally sheet, ballot box, etc., must be used.

While the same men may serve as officers at the special election, they must be specially appointed as such election officers.

Very truly,
J. Q. SMITH,
Attorney General.

CORPORATION FRANCHISE TAX:—Amount of ad valorem assessment on capital stock and collection of franchise tax when domestic corporation does no business and owns no property within State.

October 8, 1920.

Hon. John S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You state the following facts: The Carolina Mineral Corporation was incorporated under the laws of Alabama. It owns no property, does no business, and has no officers or agents in this state. Its entire business is carried on in North Carolina, and all the property owned by it is located in that state.

You submit the following questions:

First: Is the capital stock of this corporation subject to ad valorem assessment as provided in Section 12 of the Revenue Act of 1919? If so, how is the amount of the assessment determined and how can the tax be collected?

Second: How can the franchise tax due by this corporation be collected?

The very recent case of Cream of Wheat Company v. Grand Forks County, N. D., 40 Sup. Ct. Rep., page 558, conclusively establishes the right of the State, under the facts given, to collect these taxes from a corporation created under its own laws. Quoting from opinion:

> "By the statutes of North Dakota, as construed by the Supreme Court of the State, a manufacturing corporation organized under its laws is taxed in the following manner: Its real and personal property within the State is assessed like that of an individual. In addition, there is assessed against it an amount equal to the aggregate market value of its outstanding stock, less the value of its real and personal property and certain indebtedness.
>
> * * * *
>
> "The Cream of Wheat Company was incorporated under the laws of North Dakota after the enactment of the tax legislation above described, and it maintained throughout the years of 1908 to 1914, both inclusive,

a public office in the City of Grand Forks in said State for the transaction of its usual and corporate business. Its manufacuring, commercial, and financial business was conducted wholly without the State, and it had not at any time during any of those years within the State either any tangible property, real or personal, or any papers by which intangible property is customarily evidenced. Its property, as distinguished from its franchise, is alleged to have been taxed in states other than North Dakota. In 1914 the officials of North Dakota assessed against the Company in the manner prescribed by law for each year from 1908 to 1913, both inclusive, a tax at the uniform rate on the sum of $50,000.00, as representing personal property, to-wit, 'bonds and stocks' which had escaped taxation. They also assessed a similar tax for the then current year. The taxes not being paid, this action was brought in a state court for the amount.

"The Company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that State. As said by Mr. Chief Justice Taney, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The fact that its property and business were entirely in another state did not make it any the less subject to taxation in the state of its domicile."

See also:

Kansas City Ry. v. Kansas, 240 U. S. 227.

Under the facts stated, it may be difficult, or even impossible to obtain from the corporation the report required to be made by it as a predicate to the proper assessment of the capital stock. In such a case the taxing authorities must simply make the assessment on the best information available to them.

When the franchise or ad valorem tax falls due, and there is no property in Alabama out of which collection can be made, suit should be brought to enforce payment. Section 5305, Code of 1907, provides the method for serving summons on a domestic corporation which has no agent in Alabama on whom service can be made. This section provides:

"5305. Whenever it is shown by affidavit that the president or other head of a domestic corporation, the secretary, cashier, and managing agent thereof are absent from the State; and that in the belief of affiant there is no person in the employ of such corporation or doing business for it in this State, such corporation may be served with any legal process issuing from any court of record in this State, by publication in some newspaper published in the county where suit is brought, or if there is no newspaper published in the county where suit is brought, in the newspaper published nearest the place of trial; and a copy of such newspaper containing such notice must be sent by mail to the president, secretary, cashier, or other agent of such corporation, at his place of residence, if known, and if such publication is perfected twenty days before the next term of the court, the case shall stand for trial at that time; otherwise at the succeeding term, or any other term after the perfection twenty days prior thereto. This section does not apply to railroad corporations."

I think the above answers fully all questions asked by you.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Issuance of small amount of bonds would not require use of entire motor vehicle fund exclusively for interest on bonds, sinking fund, and maintenance of roads.

October 8, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Ala.

Dear Sir:

The Road Bond Amendment to the Constitution provides:

"That for the purpose of securing the prompt payment of the principal and interest of said bonds, to provide a sinking fund therefor, to place sufficient revenue

> in said State road and bridges fund, and to defray the cost of constructing and maintaining said state highways, public roads, and bridges continuously in a highly serviceable condition, that a State license tax on all automobile or motor driven vehicles is hereby authorized to be levied and collected on (and) all such vehicle privilege license tax now levied or which may hereafter be levied by law of every kind and description shall be exclusively used for the payment of said bonds, principal and interest, for creating a sinking fund for their maturity, and the remainder for the maintenance of said public highways, roads and bridges and extension of the state highway system * * * and all moneys derived from the sale of said bonds shall be expended as the Highway Department may direct, subject to the approval of the Governor."

The Highway Act, approved September 30, 1919 (Acts 1919, p. 890), was passed in anticipation of the adoption of the Road Amendment, and must be construed in connection with the Amendment. Section 8 of said Act provides:

> "That there is hereby appropriated to the State Highway Department for its use the entire net revenue derived by the State from the sale of motor vehicle licenses. Said sums herein appropriated, when received by the State Treasurer, shall be set aside in a special fund known as the State Highway Fund and be used for no other purpose than the carrying out of the provisions of this Act * * * provided, that in the event that the State shall issue and sell bonds for the construction of public roads, the appropriation herein made shall be used for the payment of interest on said bonds and maintenance of roads and to provide a sinking fund."

In view of the above constitutional and statutory provisions, you wish to know whether the sale and issuance of a small amount of bonds—$100,000.00—would require you to use the entire vehicle license tax fund exclusively for the payment of the interest on said bonds, the creation of a sinking fund, and for the maintenance of roads.

It is plainly the purpose both of the amendment and statute to create a fund, by the sale of bonds and the levy of the motor vehicle license tax, for the construction and maintenance of roads and bridges and to match appropriations made by the Federal Government in aid of highway improvements. The sale of $100,000.00 worth of bonds, bearing 5 per cent interest and maturing in twenty years could not in any event require an annual withdrawal of more than $10,000.00 from the State Highway Fund. This would pay the annual interest and the $5,000.00 annually set aside to the sinking fund would at the end of twenty years total the full face value of the bonds. It is not necessary to inquire now whether this requirement as to the creation of a sinking fund is mandatory. Whether mandatory or not, the $100,000.00 issue of twenty year five per cent bonds is fully protected by the payment of $5,000.00 each year into the sinking fund and the payment of interest as it falls due. The bond issue being thus fully protected, the remainder of the money in the State Highway Fund may be used in any manner allowed by law.

Yours truly,
J. Q. SMITH,
Attorney General.

AUTOMOBILE LICENSE:—Expense of furnishing tags, including clerk hire, paid from automobile fund.

October 8, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

Section 9a of the revenue law of 1915 (Acts 1915, p. 494) appropriated annually out of the State Treasury $10,000.00 "to pay for the purchase and delivery of the automobile tags required by this act." This law also provided that the gross revenue derived from automobile license taxes should be divided in certain proportion between the State, counties and municipalities. There was no express provision for the payment of any expense incident to the enforcement of the law except that found in Section 9a above referred to.

On May 11, 1918, the then Attorney General Tate ruled that the salary of the clerk required in the delivery of the tags and receipts from your office could not be paid out of the appropriation made by Section 9a. The construction there given seems to limit the expenditure to the bare cost of the purchase and physical delivery of the tags without taking into account expenses necessarily incident to such purchase and delivery.

It is not necessary now to challenge the correctness of that conclusion, as the Legislature of 1919 made material changes in the automobile license law.

Schedule 9 of the Revenue Law of 1919, after authorizing the State Tax Commission to "prescribe rules and regulations concerning the application for and deliverance to the licensee of the tag and receipt required by this schedule," contains the following provisions not found in the 1915 law:

1. "The money collected as motor vehicle license taxes, *less expenses*, shall be distributed as follows," etc.

2. "The money collected as motor vehicle license taxes by the State, *less expenses*, shall be used exclusively for building and maintenance of public roads and bridges as now or may hereafter be provided by law."

The appropriation for tags, etc., which was formerly paid out of the general fund, and was limited in amount, is now taken out of the automobile fund and is unlimited in amount. Schedule 9a of the Revenue Law of 1919 reads:

> "There is hereby appropriated annually out of any money in the treasury not otherwise appropriated such sum of money as may be necessary for the purchase and delivery of the automobile tags required by this Act. All bills for the purchase and delivery of said tags shall be approved by the chairman or two members of the State Tax Commission, and the auditor may draw his warrants against this appropriation in such sums, and from time to time as may be required, which shall be taken out of the automobile fund hereby created."

The entire Act evidences a legislative intent that the automobile tax shall bear the cost of its own collection and that

the *net* proceeds shall go to the road and bridge fund. Construing Schedule 9a in connection with other provisions of the law, I am convinced that the appropriation there made "for the purchase and delivery of the automobile tags" includes all expenses necessarily incident to such purchase and final delivery to the licensee. All acts required by law to be done in the purchase and delivery of such tags are necessarily a component part of the purchase and delivery contemplated by this section. The record required to be kept of such purchases and deliveries is an essential, integral part of the transactions, and the clerk hire necessary for the performance of this work can be paid out of the appropriation made by Schedule 9a of the Revenue Law of 1919.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CONVICTS:—Supervision by State Convict Department over management of county convicts.

October 8, 1920.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

In your letter of October 5 you ask whether the State Convict Department has authority to prescribe rules and regulations for the governing of convicts in counties which use only the convicts of their county on the roads and do not hire convicts from other counties for this purpose.

County convicts are under a dual management. The Court of County Commissioners or Board of Revenue of each county has direction and control over the convicts of such county, which consists mainly in determining in what manner and on which particular works the hard labor shall be performed. If the convicts are hired to contractors beyond the limits of the county they are relinquished to the sole control of the Board of Inspectors of Convicts, now the Board of Control and Economy. The control of the county commissioners over convicts is subject to the uniform rules

and regulations for the treatment of convicts that are laid down or promulgated by the convict department, and each superintendent of public works and each person employed as guard over convicts sentenced to hard labor for the county is required to take an oath to observe such rules and regulations.

The State Convict Department cannot interfere directly with the management of county convicts at work in the county where convicted, but must report to the judge of probate violations of the rules and regulations for the "welfare of the convicts subjected to penal servitude, of whom the State is guardian as it were." (Ossie v. State, 147 Ala. 152.)

Very truly,
J. Q. SMITH,
Attorney General.

OFFICE-HOLDERS:—Increase in salary due to increase in population of county not forbidden by Constitution.

October 9, 1920.

Hon. J. A. Johnson,
County Solicitor,
Fort Payne, Ala.

My Dear Sir:

In your letter of October 6 you request to be advised whether your salary is increased during your term of office by reason of the fact that DeKalb County was given by the 1910 Federal census 28,261 population, and by the 1920 census 34,426 population; and if increased, when effective.

County solicitors appointed by circuit solicitors hold office at the pleasure of the circuit solicitor, and have no definite term of office.

Acts 1915, page 819, Section 19.

In such cases there is no constitutional prohibition against increasing the salary of the incumbent at any time.

Furthermore, the constitutional provision has for its purpose preventing, during the incumbent's term of office, the enactment of the law making the raise, and is not directed against the increase taking place during such term. The act under which you claim the increase in compensation was

approved prior to your term of office, if you have a term, and simply the happening of the event causing the increase during your term does not make it such an increase as is provided by the Constitution.

In my opinion, you are entitled to draw the increased pay from the date of the announcement of the official census of the county.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—Majority of board of registrars required to sit.

October 9, 1920.

Hon. P. O. Luck,
County Solicitor,
Columbiana, Ala.

Dear Sir:

Referring to our telephone conversation this morning in regard to the new registration law, Acts 1920, page 124.

The provisions of the law are plain to the effect that it requires a *majority* of the board of registrars to perform the duties of the board.

Section 1 of said Act provides for the appointment of a board of registrars for each county, consisting of 'three reputable and suitable persons, who must be also qualified electors and residents of the county."

Section 14 provides that "the action of a majority of the board of registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business."

Section 34 authorizes the board "to make such rules and regulations as it deems proper for the receipt of applications for registration and the accomplishing in as expedient a manner as possible the registration of those entitled to register"; but, expressly provides that "no person shall be registered until a majority of the board of registrars has passed favorably upon such person's qualifications."

Sections 31, 32, and 33 provide for the sitting of the *board* at the court house and other places in the county for the purpose of registering voters.

The registrars sit and act as a *board,* and nothing done by an individual member has any force or validity until approved and adopted by a majority of the board. It is effective then because it then becomes the act of the *board.*

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

AUTOMOBILE LICENSE:—Motor hearses and ambulances are subject to license tax.

October 11, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You ask whether the owners of an auto-hearse and an auto-ambulance are subject to a license tax on such vehicles.

As you state, the license law of 1919 (Acts 1919, page 397) covers specifically (1) automobiles and motor cars kept for private use, (2) commercial trucks, and (3) automobiles or motor cars used for transportation of passengers paying fare. Neither a hearse nor an ambulance would be embraced within either license according to the ordinary usage of language.

The intention, however, clearly appears in the law of 1919 that no vehicles, except those owned by the State or some political subdivision thereof, shall escape the payment of the license tax. For this reason, and for the additional reason that the revenue law of 1919 does not purport to repeal any previous law except as it conflicts therewith, I am convinced that subdivision 7, Section 1, of the License Law of 1915, applies to the two vehicles inquired about. This subdivision reads:

> "7. For each automobile or motor car with less than forty horse-power used for commercial or business purposes, a license tax or registration fee shall be charged at the same rates as above set out, except as hereinafter prescribed; for each automobile or motor

car having a rating of forty horse-power or more, used for commercial or business purposes, twenty-five dollars."

It is true that the first motor vehicle act (Acts 1911, p. 634, Section 1) expressly excepted "ambulances" from the term "motor vehicle," as used in that law; but, it has been held that the license law of 1915 repealed all that part of the motor vehicle law of 1911 relating to the registration and issuance of motor vehicle licenses.

Foshee v. State, 72 Sou, 685.

As the license law of 1915 in terms includes all automobiles and motor cars used for "commercial or business purposes," and exempts only those automobiles, etc., owned and used by any municipal corporation in this State, it is clear that the exemption theretofore given an ambulance is repealed.

I conclude, therefore, that a motor hearse and a motor ambulance are subject to the license tax levied by the License Law of 1915.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

DOG LAW:—Not a revenue nor a criminal statute. Dogs may not be killed on owner's premises.

October 14, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

My Dear Sir:

You desire a construction of what is commonly called the "Dog Law" (Acts 1919, p. 1077), on the points discussed below:

First: This law is not a revenue measure within the meaning of Section 70 of the Constitution which prohibits the passage of revenue bills "during the last five days of the session." It is, as it purports to be, an act "for the protection of human beings and of live stock of all kinds."

It was enacted under the police power of the State as a police regulation. Kennamer v. State, 150 Ala. 74; Sheppard v. Dowling, 127 Ala. 1; Bozeman v. State, 61 Sou. Rep. 604.

Second: The failure or refusal to register or muzzle a dog, as required by this act, does not constitute a criminal offense. Confessedly, the act itself does not in terms create such an offense or provide any punishment for any violation of its provisions. Section 1 of the act simply provides that "it shall be *unlawful* for any person, etc., to keep or harbor any dog, or dogs within the State of Alabama, except as hereinafter provided." But, it is supposed that the penal provisions of the License Law of 1919 (a separate and distinct act) can be read into the Dog Law and that the owner of the dog can be punished as one who fails or refuses to take out a license. This position is untenable.

The Legislature of 1915 passed two separate revenue measures, one the general revenue law, relating mainly to ad valorem taxation, the other the license law, fixing the amount of licenses on various vocations and businesses and designating the time and providing the machinery for the collection of these licenses. Contrary to the usual custom, the corporation franchise tax was not put in the license law, but was embraced within the provisions of the general revenue law. The general revenue law fixed no time for the payment of this franchise tax. It was, therefore, very plausibly argued that, as a franchise tax was in a sense a license tax, and had been so treated by the Supreme Court in several of its opinions, the Legislature must have intended that the franchise tax was due and payable at the time all other licenses were due and payable. The Supreme Court, in Williams, Probate Judge, v. Mobile L. & R. R. Co., 195 Ala. 118, in answering this argument, said:

> "In the case at bar, however, the legislature has made and recognized a distinction between a franchise tax and a privilege or license tax by dealing with them differently in separate and distinct acts, and we are satisfied that it was not intended that Section 18 of the *license act* refers to the franchise tax, as provided by the *revenue act* in Section 16 of same."

Under Section 12 of the "Dog Law," the license inspector is 'charged with the collection and enforcement of this act in regard to delinquent dog tax licenses, as they are now required to do as to all other delinquent licenses." In view of the well known rule that penal statutes must be strictly construed, we cannot be justified in concluding that the Legislature has in this indirect manner created a criminal offense. The license inspector, even under the revenue law proper, is not expected to collect licenses solely by criminal proceedings. In fact, he is required first, except in cases of emergency, to cite the delinquent to appear before the probate judge. If it be further contended that the delinquent has been so cited and that he still refuses to register his dog, then we answer that the fault is with the Legislature in not constituting such refusal a crime.

Young v. State, 48 Sou. Rep. 490.

Third: The amount of this dog tax and penalties being definitely fixed by statute, so that a sum certain may be recovered, and the statutory method of collection not being in terms exclusive of other remedies, suit may be brought against the delinquents for the collection of said license tax and fees. Quoting from the opinion in State v. Fleming, 112 Ala. 185:

> "We then have the case as one where a specific ascertained amount is imposed as a tax for the use of the State, and no special statutory provision for the collection of the tax is provided. In such cases, upon principle and authority, the proper action is debt."

Also 12 Michie's Digest, page 160:

> "Assumpsit will lie for the collection of taxes, although a statutory action is given." Citing many Alabama cases.

The same rule applies to the collection of licenses, as appears in Fleming case, supra, and the following cases:

Standard Chemical Co. v. Troy, 77 Sou. 383.
Sou. Car. & F. Co. v. State, 133 Ala. 624.
Sou. Car. & F. Co. v. State. 141 Ala. 250.

Fourth: As previously ruled by this office, Section 15 of the Dog Law does not authorize a sheriff or constable

to kill an unmuzzled dog, except when "found running at large" and unaccompanied by his owner or the person to whom he is entrusted. Section 11 of this law makes it "the duty of all sheriffs and constables and license inspectors to kill on sight any dog found by them running at large, not wearing the identification tag showing the registration number of said dog, or not wearing a muzzle provided by this act." This section further provides that "any sheriff or constable who fails to discharge the duty imposed by this section *within five days after a dog has been reported to him* as running at large shall be guilty of a misdemeanor." The duty imposed is to kill any dog found by them *running at large.* The officers themselves may find the dog running at large, or he may be found running at large as a result of a report made to them of the fact. In either event, the dog must be actually running at large, contrary to the provisions of the act, at the time he is killed. I find nothing in the law which authorizes these officers to kill a dog because *he has been* running at large. The duty to kill "on sight" is confined to the *very time* the dog is caught in the act of running at large. There is certainly nothing in the law which permits an officer to go on the private premises of an owner and kill a dog found there, merely because it had been reported to him that that particular dog *has been* running at large. A duty so drastic in itself and fraught with such ominous consequences cannot fairly be implied from the equivocal language used in Section 11. The dog's life is not forever forfeit because of the *one offense.* Once he reaches his City of Refuge—his Master's house—he is safe from molestation and harm so long as he stays at home. If he wanders abroad again, contrary to the law, he may be killed on sight, like any other felon caught in the commission of the crime.

Fifth: Any sheriff may be removed from office by impeachment proceedings for "wilful neglect of duty, corruption in office," etc.

Constitution of Alabama, Section 173 and 174.

A wilful failure to enforce the "Dog Law" is, therefore, an impeachable offense.

Yours truly,
HENRY P. WHITE.
Assistant Attorney General.

SCHOOLS:—Statute increasing amount of State aid for rural schools not retrospective in effect.

October 14, 1920.

Hon. John W. Abercrombie,
Superintendent of Education,
Capitol.

Dear Sir:

Section 3, Article 18, of the School Code was amended at the Special Session of the Legislature so as to increase the amount of State aid for building or repairing rural schools. Prior to the passage of this amended act, applications for aid had been approved by you for the amounts then allowed by Section 3, and warrants for same had been drawn by you as required by Section 5 of Article 18 of the School Code.

You ask whether this amended act is retrospective in effect, so that these same schools to which aid has been given can now obtain from the State the additional amount allowed by the amended act.

> "A statute is never allowed to have a retrospective operation, unless clearly so expressed, or unless such implication must be made to give effect to the manifest intent of the Legislature."
>
> Phillips v. Gray, 1 Ala. 226.

This rule is emphasized in the recent case of Barrington v. Barrington, 76 Sou. Rep. 81, where Judge Somerville collates the Alabama decisions on this point. There is nothing in the body of the act to indicate that the increased appropriation there made shall apply to applications already approved under the old law. Your approval of the application and the drawing of the warrant exhausts your power in the premises, except only to inspect the work when completed and, if approved, to release the State aid fund from the trust imposed upon it. The *amount* of the State aid has already been fixed and determined and the subsequent steps taken by you are simply to insure the expenditure of the money in the manner and for the purpose provided by law.

I advise you, therefore, that the amended act is not restrospective in effect.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSES:—Fine not discharge of liability for tax.

October 14, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You ask whether a fine imposed on parties, under Section 367 of the Revenue Law of 1919, for a failure or refusal to take out a license is in lieu and discharge of license liability.

This identical question was decided in State v. Fleming, 112 Ala. 179:

> "Headnote 3. The right of the State to recover in an action of debt the license tax for engaging in the business of retailing spirituous liquors is not affected or concluded by the criminal statute, which provides that upon the conviction of any person for engaging in a business for which a license is required, without having taken out such license, he shall be fined three times the amount thereof; the purposes of the two statutes being different, and the remedy provided by the latter being neither specific nor exclusive for the collection of the license tax."
>
> 25 Cyc. page 628.

"Payment of a fine imposed for failure to take out a license does not discharge the debt for the amount of the tax."

See also:

Nurdlinger v. Irvine, 4 Atl. Rep. 166.
City of Lexington v. Wilson, 118 Ky. 221.

The opinion of the Court of Appeals, in Dunning v. Town of Thomasville, 75 Sou. Rep. 276, is contrary to the con-

clusion reached by the Supreme Court in the Fleming case, supra. The Court of Appeals cites only these three cases in support of its conclusion:

U. S. v. McKee, Federal Cases No. 15, 688.
Caffey v. U. S. 116 U. S. 442.
Stone v. U. S., 64 Fed. 667.

These federal cases are not in accord with the weight of authority and are in direct conflict with the opinion of our own Supreme Court. The Fleming case, supra, has never been over-ruled by our Supreme Court on this particular point, though it has several times been cited with approval on other points. This case does not appear to have been called to the attention of the Court of Appeals.

I conclude, therefore, that the payment of a fine for failing or refusing to take out a license does not discharge liability for the license.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

JUDGE OF PROBATE:—Per diem and fees for duties connected with public roads in St. Clair County.

October 15, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

In answer to inquiries made by Judge Easterly, I beg to advise you as follows:

First: The Local Road Law for St. Clair County (Acts 1911, p. 78) provides for the creation of a board of road commissioners, composed of three members, two of whom shall be appointed by the Governor. The probate judge, who shall be ex-officio chairman of such board, is the other member of said board. Section 4 of this act requires the board to appoint *"one of their members"* as secretary and treasurer of such board. Section 6 requires the secretary and treasurer to keep a record of the proceedings of such board, to conduct the correspondence, and to receive and

keep a correct account of the receipts and disbursements of all funds coming into the hands of the board. I can find nothing in this law which authorizes the road commissioners to employ and compensate a bookkeeper. All bookkeeping duties are expressly imposed on the secretary and treasurer and his per diem as commissioner pays for these services. The board, therefore, was without authority to pay Mr. A. B. Davis for services which should have been performed by the secretary and treasurer and for which he was compensated as a member of the board.

Second: Section 3720 of the Code of 1907, as amended by the Acts of 1911, page 154, which fixes the fees and allowances of probate judges, contains the following among other provisions:

> "Discharging his duties in relation to public roads, on proof to the county commissioners that he had discharged such duties, annually, to be paid out of the county treasury, not exceeding $400.00; provided, that this shall not apply to any probate judge who receives net annual compensation from his office exceeding five thousand dollars."

The per diem allowed the probate judge by the Local Road Law of St. Clair County, as ex-officio member of the board of road commissioners, if it is intended to be in addition to the amount fixed by Section 3720 of the Code, as amended, is an illegal increase of the probate judge's compensation. The duties performed by a probate judge in relation to public roads are recognized as "ex-officio services" within the meaning of Section 68 of our Constitution. The allowance for such services may therefore, be increased by the Legislature so that a probate judge now holding office can get the benefit of such increase.

Macon County v. Abercrombie, 184 Ala. 283.

But this increase must be made in conformity to the Constitution. The Legislature has already by general law fixed the maximum annual allowance to probate judges, for their "ex-officio services" in relation to public roads, at $400.00. This is intended as a compensation for *all* services relating to public roads, and is applicable to all the counties in the State. The Legislature cannot by a local law,

applying alone to St. Clair County, increase the ex-officio compensation of the probate judge of that county above the amount allowed by the general law to all other probate judges in the State.

Constitution Alabama, Sections 96, 104, 105.

I am of the opinion, therefore, that the per diem allowed the probate judge in this Local Law is in contravention of our Constitution.

Third: What is said above as to the probate judge's per diem applies also to the commissions given the tax assessor and tax collector by this local law for the assessment and collection of special road taxes. The local law is ineffective to change the provisions of the general law. You will, therefore, look only to the general law in determining what commissions should be allowed the assessor and the collector.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Highway Commission may itself construct roads, without letting contracts.

October 19, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Ala.

Dear Sir:

You state that a contract with J. M. Wolfe & Sons for the construction of a certain road in Morgan County has been annulled, for lawful cause, and the State Highway Commission now desires to complete the work. You ask whether the Commission *itself*, without awarding another contract, can proceed with this road construction.

An examination of the Highway Act of 1919 shows that the Commission is vested with the general superintendence and control of the construction and maintenance of roads and bridges. The authority of the Commission to actually construct roads may be inferred from the general language of the act, even in the absence of the specific provisions

hereinafter referred to. Section 4 of the act authorizes the Commission to employ "such assistants, engineers, chemists, clerks, stenographers, draftsmen, *foremen and laborers*, as may be necessary for the proper carrying on of the work of the State Highway Department, and fix their compensation, which shall be paid out of the State Highway Fund." Section 9 of this act authorizes the Commission to adopt such rules and regulations for the construction and maintenance of roads and bridges as it deems proper. Section 11 allows the Commission to use the State Highway Fund in the construction and maintenance of the State trunk roads and bridges on the State trunk roads. Section 12 requires advertising for bids, "whenever it is proposed to do said work by contract," etc., thus clearly implying that the work may be done by the Commission itself, without being let out by contract. Section 17 authorizes the Commission to purchase all live stock, machinery, tools and other equipment that it deems necessary for use upon roads or bridges constructed or maintained under the provisions of this act, and pay for same out of the State Highway Fund. The authority to purchase this equipment necessarily includes the right to *use* the equipment when purchased. Section 18 provides that the "State Highway Commission may make such changes or additions to the system of state trunk roads as it may deem proper and construct and maintain the same with State aid under the provisions of this act." Section 19 authorizes the State Highway Department to work State convicts in the construction and maintenance of public roads and bridges.

Other provisions of the Highway Act might be cited, but these are sufficient to show that the Highway Commission has ample authority to undertake *itself* the completion of the Morgan County road project.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

MONEY LENDER'S LICENSE:—Corporation not actually doing a banking business liable for license for engaging in business of money lending.

October 21, 1920.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

My Dear Sir:

The Chickamauga Trust Company, a Tennessee corporation, which has complied with the provisions of our law as to doing business in Alabama, claims exemption from the money lender's license because it has been "organized as a bank." Schedule 70 of the Revenue Law of 1919 provides that this license "shall not apply to banks or banking institutions regularly organized as such." (Acts 1919, page 419.)

The charter of this corporation authorizes it to conduct a general banking business, but, according to your statement, it does not *in fact* conduct a banking business.

In my opinion, the words *"regularly organized"* as a bank mean more than merely *incorporated* as a bank. The statute means organized for business as a bank, not simply authorized to conduct a banking business. If the corporation in question does not *do* a banking business, the fact that its charter authorizes the conduct of such business will not exempt it from the money lender's license, if it is otherwise liable for such license.

Yours truly,
J. Q. SMITH,
Attorney General.

JUDGE OF PROBATE:—May employ clerk in his office to assist in preparing election lists.

October 24, 1920.

Hon. P. B. Jarman,
Judge of Probate,
Livingston, Ala.

Dear Sir:

The Attorney General has referred to me for reply your letter of the 21st inst., in which you request an opinion as

to whether a probate judge may use his regular clerk in assisting in the making of the list of qualified electors required under Section 36 of the act to regulate elections, etc., paying such clerk along with his other assistants at the rate prescribed in the Act.

Section 36 of the act to which you refer authorizes the judge of probate to employ such assistants and clerical help as may be needed to prepare the lists of qualified electors, the only limitations upon this authority prescribed in said section being the method by which such parties shall be compensated and the amount which shall be paid to such assistants. Since there is no inhibition against a judge of probate using one of his regular clerks for this work, I am of the opinion that a probate judge has the same authority to draw a warrant in favor of one of his regular clerks for such work as he has to draw a warrant in favor of any other party. No obligation rests upon such clerk to do such work and if he desires to do so at times when it will not interfere with his regular duties, and the probate judge sees fit to permit him to do so, I see no reason why he may not work in that capacity as well as any outsider.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

JUDGE OF PROBATE:—No per diem and expense may be paid under local road law of St. Clair County, but clerical assistance may be employed under general law.

October 25, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Further referring to the per diem and expenses allowed the Probate Judge of St. Clair County, by the Local Road Law for that county (Acts 1911, p. 78), for his ex-officio services as a member of the Board of Road Commissioners:

First: We are confirmed in our original conclusion that the provision of the local law allowing this per diem and expense to the Probate Judge violates three distinct sections

of our Constitution, viz.: Sections 96, 104 (24) and 105. The county, therefore, cannot legally pay the Probate Judge the per diem and expenses fixed by this law.

Second: In an opinion rendered by Assistant Attorney General R. V. Evans, on July 3, 1919, it was held that, under the general road law, the Commissioner's Court has "authority to employ such clerical help as may be needful or necessary to carry out the provisions thereof." The Local Road Law for St. Clair County having been repealed in 1919 and a new law passed adopting the provisions of the general road law, I am of the opinion, under the above ruling, that the commissioner's court of St. Clair County now has authority to hire clerical assistance to keep the proper road records.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Counties may not be reimbursed except from proceeds of sale of State road bonds.

October 25, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Ala.

Dear Sir:

The Attorney General has referred to me for reply your letter of the 22nd inst., making inquiry as to whether the State Highway Commission has authority to refund money to a county which has expended money for the purposes mentioned in your letter, from funds derived from the sale of motor vehicle licenses.

The authority of the State Highway Commission to refund such sums is expressly limited by the provisions of the act to reimbursements from certain funds, namely, "from any funds that may be derived from the sale of State road bonds." (Acts 1919, page 894.)

Inasmuch as the authority conferred upon the Commission to make such refund is expressly limited to payment from funds derived from the sale of State road bonds, I do not think that the Commission has any authority to make

payment of such amount as may be expended by such counties, from funds derived from the sale of motor vehicle licenses. The Legislature could as easily have provided that such refund might be made from any funds existing to the credit of the State Highway Commission, but it did not see fit to do so, preferring to require that such refund could only be made from funds secured by the sale of the State road bonds. Since the Legislature has decreed in express terms and unequivocally, that any refund must be made from funds derived from the sale of State road bonds, I am of the opinion that the Commission is without authority to undertake reimbursements to the counties from any other fund.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

SCHOOLS:—Non-resident pupils are not entitled to free tuition, even though parents pay taxes within district.

October 26, 1920.

Hon. John W. Abercrombie,
State Superintendent of Education,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 26th inst., in which you make inquiry as to whether the statute (Section 1756 of the Code of 1907) providing that non-residents of a city shall be entitled to free tuition in the public schools of the city provided the parent pays taxes on $500.00 worth of property therein, is still in force; or whether it is repealed by the provisions of the school code embodied in Act approved September 26, 1919.

The section of the Code to which you refer provides that any parent or guardian residing within the State who shall pay a local or special tax on real estate valued at five hundred dollars or more in any city or school district shall be entitled to the privileges and benefits of the public schools in such city, or school district, for their children, the same as parents and guardians resident therein, the provisions

of the charter of any municipality or separate school district in conflict being expressly repealed.

Section 10 of the School Code to which you refer in your letter (Acts 1919, p. 597) provides that the City Board of Education subject to the provisions of the Act shall have power to establish and maintain a system of public schools, including kindergarten and play grounds, in which children from five to twenty-one years of age, *"bona fide residents of and living within the corporate limits of such city shall be entitled to admission."*

It will be noted that this statute expressly limits the right of admission to schools within the boundaries of a city to the residents or persons living within the corporate limits of the city. Section 10 above referred to further provides that city and county boards of education shall have authority to reach agreements whereby children in the city may attend the schools in the county, and whereby the children in the county may attend the schools in the city, and they shall do so in the city or in the county, as the case may be, if nearer to such pupils, and that other *non-resident pupils may be admitted on such terms as the board of education of the city may prescribe.*

I am of the opinion that the provisions of Section 10 above referred to are in direct conflict with the provisions of Section 1756 of the Code, and that this section of the Code is for that reason no longer operative.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

SCHOOL FUNDS:—Tax assessor and collector must be allowed commissions on special school taxes.

October 28, 1920.

Hon. John W. Abercrombie,
Superintendent of Education,
Capitol.

Dear Sir:

You state that the Board of Revenue of Jefferson County has passed a resolution to the effect that it will not allow

any commissions to the assessor and collector for the assessment and collection of special school taxes.

You wish to be advised whether Section 197 of the Revenue Law of 1919 is mandatory. The pertinent part of this section provides:

> "The tax assessors and tax collectors shall receive such commissions as may be allowed by the commissioners' court, boards of revenue, or other governing bodies of the several counties of the State, to be not less than one-half of one per cent, and not more than one per cent each as fees on all school funds assessed and collected by them, to be paid out of such special taxes."

In an opinion rendered by Assistant Attorney General Harwell G. Davis on January 19, 1920, it was held that the term "all school funds, "as used in this section, is limited to special county and district school funds and does not include State school funds. It was also held in this same opinion that the duties imposed on the assessor and collector, as to the assessment and collection of these special school taxes, were "ex-officio services" within the meaning of Section 68 of the Constitution; and that, therefore, the present incumbents of the offices of assessor and collector were entitled to receive the commissions allowed by Section 197 of the Revenue Law of 1919.

Under the express provisions of the Revenue Law of 1915 the assessor and collector were denied any commissions on local or special county school taxes. It seems plain, therefore, that the above quoted provision of Section 197 of the Revenue Law of 1919 was put in for the very purpose of insuring these officers a minimum commission of one-half of one per cent. The statute also fixes a maximum compensation of one per cent. The Board of Revenue, within the limits set by law, may fix the allowance of these officers. This discretion, however, cannot be so exercised by the Board of Revenue as to deny altogether any commission to the assessor and collector. In my opinion, the statute is mandatory. The Board of Revenue *must* make an allowance to these officers—not less than one-half of one

per cent, and not more than one per cent, on all special county and district school funds.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CHAUFFEUR'S LICENSE:——Required for driver of school truck.

November 4, 1920.

State Tax Commission,
Capitol.
Gentlemen:

You ask the following question:

"Are persons acting as chauffeurs in driving motor trucks and carrying children to and from school under contract of hire, required by the law to take out a chauffeur's license?"

This license is levied by Section 23, Acts 1911, p. 643, as amended by Acts 1919, p. 1003.

In an opinion rendered you by this office on October 7, 1920, we held that the drivers of all automobiles devoted to a "public use" were subject to a chauffeur's license. "Public use," as here used, is contra-distinguished from "private use." As stated by Judge McClellan, in City of Montgomery v. Orpheum Taxi Co., 82 Sou. 119:

> "The effect of the provisions of the State law for the licensing of chauffeurs affirmatively restricts the requirements for the licensing of such drivers to those only who drive automobiles for hire for public use, excluding from the exaction 'chauffeurs' who drive automobiles devoted to private use."

It is obvious that a motor truck, carrying children to school for hire, is devoted to a "public use" as distinguished from a "private use." The driver of such a truck is, therefore, subject to a chauffeur's license.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Commission cannot accept county bonds in lieu of cash required of county for road work.

November 4, 1920.

Hon. W. S. Keller,
State Highway Engineer,
City.

Dear Sir:

You ask whether the State Highway Commission has authority to buy or accept at par $50,000 of Montgomery bonds, in lieu of the cash money required to be put up by Montgomery County with the State Highway Department, in constructing a bridge across the Tallapoosa River near Judkins Ferry.

The fountain sources of your authority in the premises are found in the Highway Act of 1919, and in the recently adopted Road Bond Amendment to the Constitution. You have no authority to receive or expend moneys except in the manner and for the purposes specified in the Act and the Constitutional Amendment. There is nothing either in the Act or in the Amendment which could authorize you to accept anything but cash money or labor in payment of the amount required of a county. The revenue of the Highway Department accrues from two sources: (1) From the sale of bonds authorized by the Constitutional Amendment and (2) from the motor vehicle license taxes. The Amendment expressly provides that "the proceeds derived from the sale of said bonds shall be deposited in the State Treasury and kept in a separate fund and shall be *exclusively* used to defray the cost of constructing and maintaining said highways, public roads and bridges of the State." The motor vehicle license tax authorized to be levied by this Amendment is required to be "exclusively used for the payment of said bonds, principal and interest, for creating a sinking fund for their maturity, and the remainder for the maintenance of said public highways, roads and bridges and extension of the State highway system." Section 11 of the Highway Act authorizes the Commission to condition any appropriation to counties "upon an appropriation by the county for said work of an amount fixed by the Commission." The Commission in this case has conditioned its appropriation in aid of the Tallapoosa River bridge construc-

tion upon an appropriation by Montgomery County of $50,000. This condition is not met by a delivery of bonds in that amount, nor in any event, would the Commission be authorized to accept bonds in lieu of money.

I conclude, therefore, that the Highway Commission has no authority to buy Montgomery County bonds or to accept these bonds in place of money.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

STATE HARBOR COMMISSION:—Salary paid an employee in any month may not exceed one-twelfth of yearly appropriation for his position.

November 6, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 5th inst., concerning compensation of employees working under the direction of the State Harbor Commission.

Section 57 of the 1915 Act which you quote in your letter provides that "the monthly salary of the secretary and treasurer, chief wharfinger and other employees of the board shall be fixed by the commissioners." Section 1569 of the Code of 1907, provides that "the salaries of all officers are payable on the last day of each month."

Under the statutes above referred to it becomes the duty of the commissioners to fix the monthly salaries to be collected by each of the employees mentioned in your letter, and the Code makes provisions for paying each of these parties at the end of each month.

The $10,000 appropriation referred to in Section 57 of the 1915 Act no longer exists, as it was made to run for a period of only four years. It therefore results that the only authority for the payment of these employees is contained in the 1919 Act referred to in your letter. By the provisions of this Act a certain amount is set aside to pay each of these

officers and this amount cannot be exceeded in any one year, and I do not think that you are authorized to pay any of these parties for any month exceeding one-twelfth of the amount set apart for him for the year. To illustrate: the secretary and treasurer is allowed by the appropriation $2400 for each year and when construed in connection with the 1915 Act and the Code section above referred to, he is limited to an amount not exceeding $200 per month as his salary, and the salaries of the other employees could be fixed at a sum for each month less than one-twelfth of the annual appropriation for each one, but not to exceed one-twelfth of the amount appropriated for his position for each year.

The 1919 Act makes provision for paying the salaries of chief wharfinger, three deputy wharfingers, secretary and treasurer, and for a clerk and stenographer. There is no provision for any salary for an assistant secretary and treasurer, and I do not think that you have any authority to pay the salary of an assistant secretary and treasurer, although I think you are authorized to pay to the clerk and stenographer a sum not to exceed $70.00 per month, or $840 per year. I note that requisition is made upon you in favor of each of the deputy wharfingers for $175.00. The total amount appropriated for the salaries of the deputy wharfinger is $1320 each per year, or not to exceed $110.00 per month. While you do not state that the requisitions made upon you are for salaries for one month, I assume that to be the case.

I think you should have in your office a statement by the Commission as to the amount which they have fixed for the salary of each of the employees, as required by the 1915 Act, and that you should not honor any requisition for the payment of the salary of any of these employees for any amount to exceed the sum so fixed, or to exceed one-twelfth of the amount appropriated for each employee. The Commission, in my judgment, has no authority to pay any employee for any one month's service an amount in excess of one-twelfth of the amount appropriated for his position for each year's service.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—Per diem of registrars for two weeks after October 26, 1920.

November 8, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

I beg to advise as follows as to the compensation due registrars for their services under the 1920 Registration Law:

Section 4 of this law allows each registrar $7.50 a day, to be paid by the State and disbursed by the several probate judges, *"for each day's attendance upon the sessions of the board."*

Section 31 of said Act, for the purpose of registering all voters who have become qualified since January 5, 1920, requires the board of registrars to remain in session each day (except Sunday) from the approval of the Act up to and including October 26, 1920.

Section 35½ of this Act requires the board of registrars, within two weeks after the expiration of the time prescribed for registration, to return an alphabetical list of the registered voters to the probate judge's office.

The time for registration expired this year on October 26, less than two weeks before the date of the election—November 2. And, as Section 35 of this Act requires the probate judge to deliver lists of the qualified electors to each voting place immediately preceding the election to be held on November 2, it is assumed that the Act inferentially requires the registrars to deliver this list to the probate judge before the date of the election. The Legislature, however, at the time of the passage of this Act, was advised as to the date of the election, and, if it had not intended for the two-week period to apply to this election, it could have so expressed itself. The Act does not attempt to require an impossibility for the registrars. After completion of the work of registration, and it could not in the nature of things be done sooner, the board is allowed not longer than two weeks for making the list of voters required by Section 35½.

The Board is in session under the law, whether it is registering voters or compiling the list required by Section 35½,

and for each day's attendance in the performance of these duties (excepting Sundays) each registrar is entitled to $7.50.

You should be governed by the certificate of the probate judge, provided the attendance certified by him does not extend longer than two weeks after October 26, 1920.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION:—Collection of judgment against a domestic corporation all of whose property is within another state.

November 9, 1920.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You ask how a judgment obtained in this State against a domestic corporation, which owns no property in this State, can be enforced in the State where it does own property.

On October 8 we advised you as to the procedure necessary to obtain this judgment in Alabama. Your present inquiry is merely as to the method of collecting this judgment.

Article 4, Section 1, of the United States Constitution provides:

> "Full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

This clause of the Constitution does not mean that execution may issue in another state on a judgment obtained in this State. Suit must be brought in the other state on the judgment obtained in this State, and the courts of the other state are required to give full faith and credit to our judicial

proceedings, when the same are authenticated as provided by Act of Congress. The method of authenticating these proceedings is prescribed by United States Compiled Statutes, 1916, Volume 3, Section 1519.

In bringing suit in a sister state, we must, of course, conform to the laws of that state.

Very truly yours,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Highway Commission cannot cancel a contract made between a county and a contractor.

November 10, 1920.

Hon. W. S. Keller,
State Highway Engineer,
City.

Dear Sir:

The Attorney General has referred to me your letter of the 8th instant for reply. The contract enclosed with your letter is herewith returned.

You state in detail the arrangement which was made for contribution by the county, the State and the Federal Government for the construction of Federal Aid Project No. 26, in Cleburne County, and that the State Highway Commission passed a resolution reading as follows:

> "Resolved by the State Highway Commission of Alabama that unless the County of Cleburne makes some provision for carrying out its part of agreement to construct and surface Project No. 26, it will be the duty of the Highway Commission to release the contractor from his agreement to surface this road."

You request this office to advise you if the State Highway Department can legally release the contractor without creating a liability to the State.

The 1911 Highway Act (Acts 1911, page 223), under the authority of which the contract to which you refer was made, provides in Sections 1 to 4, both inclusive, for the creation of the Commission, its duties, the duties of the

engineer and other employees, and these sections of the Act have no direct bearing upon the contract here involved. Sections 5 and 6 and 14 of the Act provide in a general way for appropriations, how the fund shall be appropriated or drawn from the State road fund by the various counties, the manner in which application shall be made by the counties for such money and that all moneys paid out of the State treasury under the provisions of this Act shall be paid to the treasurers of the various counties of Alabama on the warrant of the State Auditor upon the certificate of the State Highway Commission, etc., it being further provided that in no instance shall the amount authorized to be paid out of the State Treasury exceed that which may be for the same purpose paid out of the treasury of the county in which a contract involving a road where State Aid is used, is made.

From the provisions last referred to, it will be observed that when the money passes from the control of the State and into the hands of the county treasurers of the various counties, the State ceased to have control with reference thereto so far as the making of a contract for the construction of State Aid Roads is involved, further than the general supervision over such roads in the matter of construction, etc.

It will be noted that Section 9 of this Act provides that the contract for such projects shall be made and entered into by the county and that bond shall be furnished in double the amount of the contract price, both the contract and the bond to have the approval of the State Highway Department. Then follows a provision as to the authority of the State Highway Engineer over the payments to be made for such work.

The gist of the whole statute to which I wish to draw your attention is to the effect that the county and not the State Highway Department is the contracting party and enters into the contract with the party who is to do the construction work, and that the State has no connection with the contract and the bond further than to approve it. I am therefore of the opinion that neither the State of Alabama nor its Highway Commission can legally release the contractor from a contract entered into by and between such contractor and any county of the State, and that

neither the State nor the Highway Commission should undertake to do so.

I am of the opinion that under the statute to which I have referred when a contract shall have been made and approved, any deviation therefrom or amendment thereto must be effected primarily through the county subject to the approval of the Highway Engineer. I would therefore advise that you notify the county and the Stanley & Singer Construction Company that the matter will have to be worked out by them and that the State has no authority to release or in any way modify the obligation under said contract of either of the parties thereto.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

HEALTH LAWS:—Requirement for use of individual drinking cups in counties with or without health officers.

November 10, 1920.

Hon. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

You request this office to supply you with an opinion as to whether Section 5 of the regulations for the control of soda fountains promulgated and published by the State Board of Health can be enforced.

This Section No. 5 referred to reads as follows:

> "Section 5. In communities in which regular inspection and supervision of soda fountains is not maintained, no mixed, compounded, prepared, or tapped cold drink shall be served at any soda fountain except in an individual cup. The presence of glasses on the fountain in such communities shall be considered prima facie evidence of their use."

Subsection 6 of Section 702 of the Code of 1907 as amended by the Acts of 1919 (Acts 1919, page 911), reads as follows:

"(6). To adopt and promulgate rules and regulations providing proper methods and details for administering the health and sanitary laws of the State, which rules and regulations shall have the force and effect of law and shall be executed and enforced by the same courts, bodies, officials, agents and employees as in the case of health laws; and any person knowingly violating or failing or refusing to obey or comply with, any such rule or regulation shall be guilty of a misdemeanor and shall be punished in accordance with the provisions of Section 7073 of this Code; and if the violation or failure is a continuing one each day's violation or failure shall constitute a separate offense and be punishable accordingly."

The substance of this Subsection 6 is that the State Board of Health has the power to adopt and promulgate rules and regulations providing for proper methods and details for administering the health and sanitary laws of the State, which rules and regulations shall have the force and effect of law, and that any person who knowingly violates, fails or refuses to obey or comply therewith shall be guilty of a misdemeanor and subject to punishment as provided in Section 7073 of the Code.

In the recent case of Parke et al v. Bradley, State Treasurer, 86 South. 28, the Supreme Court of Alabama held that the implied constitutional limitation against the delegation of the law-making power was never intended to prevent legislatures from authorizing their own appointed agencies to make such minor rules and regulations as are necessary and appropriate for the administering and enforcement of the general laws of the State.

Under the rule announced in the above case I am of the opinion that the legislature had the power to authorize the State Board of Health to adopt and promulgate rules and regulations, as was done in Subsection 6 above referred to. In my opinion the provisions of the Health Code are sufficiently broad to provide for the inspection of soda fountains and the promulgation of rules and regulations on that subject.

Section 5 of the regulations for the control of soda fountains appears to me to be reasonable, and I am of the opin-

ion that it can be enforced in any community in the State in which regular inspection and supervision of soda fountains is not maintained. It is my understanding from the conversation with you that you have construed Subsection 6 of the regulations, which covers inspection in communities in which the local health authorities maintain satisfactory supervision, as applying to the seventeen counties of the State in which there is an all-time health officer. In my judgment you can enforce Section 5 even in the counties where there may be an all-time health officer if satisfactory supervision over the methods employed in soda fountains is not maintained in such counties.

I do not think there is any merit in the contention that a discrimination results from the two different methods provided for in Sections 5 and 6. It is evident that the State Board of Health in promulgating these rules entertained the opinion that the public health could be satisfactorily provided for by the sterilization of glasses where satisfactory and constant supervision over the same should be maintained, and certainly that could not be done in counties in which there is not an all-time health officer for the reason that there is no one provided to do this work. It is evident also that the State Board of Health can reasonably assume that a proper system of sterilization and sanitation could not be maintained in counties in which regular inspection is not made of the sterilization of drinking glasses, and I think the rule promulgated by the State Board of Health for the use of paper cups in such counties would be sustained.

In short I am of the opinion that the classification made by the Board in Sections 5 and 6 of the regulations promulgated for the control of soda fountains is justifiable, and enforceable, and that Section No. 5 can be enforced in any county in the State in which it might be discovered by the State Board of Health that the matter is not being handled satisfactorily under the rules promulgated in Section 6.

Yours truly,

LAMAR FIELD,
Assistant Attorney General.

INSECTICIDE LICENSE:—Each retail establishment selling $1,000 worth of insecticides is liable for license, regardless of connection with wholesaler or other retail establishments.

November 10, 1920.

Mr. J. M. Moore,
Agriculture & Industries Department,
Capitol.

Dear Sir:

Referring to the attached inquiry from the Glidden Company as to the license due for the manufacture and sale of insecticides, under the Act of 1919, (Acts 1919, page 709) I beg to advise as follows:

This Act purports to regulate the manufacture, sale, offering for sale, and other disposition of insecticides and fungicides in the State of Alabama. The first clause of this Act provides that it "shall govern the manufacture, sale, offering for sale, or other disposition of insecticides, fungicides or ingredients thereof, &c., *within the State of Alabama.*"

Section 11 of this Act levies a license in the following language:

> "That each person who manufactures, sells, or offers for sale within the State insecticides, fungicides, or articles herein mentioned, shall pay an annual tax as follows: Each manufacturer, wholesale dealer, commission merchant, jobber and broker whose gross annual sales of said articles or commodities during the preceding year exceeds $50,000.00, $250.00; when such sales exceed $40,000.00 and do not exceed $50,000.00, $200.00; when such sales exceed $30,000.00 and do not exceed $40,000.00, $150.00; when such sales exceed $20,000.00 and do not exceed $30,000.00, $100.00; when such sales exceed $10,000.00 and do not exceed $20,000.00, $50.00; and when such sales do not exceed $10,000.00, $25.00. Each retailer whose gross sales of said articles or commodities are not less than $1,000.00, $5.00."

This license, it will be noted, is divided in two general classes: (1) In the first class are included manufacturers, wholesalers, commission merchants, jobbers, and brokers, and their license is graduated according to the amount of

gross sales; and (2) all retailers whose gross sales amount to $1,000.00, or more, pay a license of $5.00.

The expression "each retailer," as we construe it, means each separate retail establishment. If the same concern owns and operates several retail stores, and each store sells insecticides &c, to the amount of $1,000.00, then each store is liable for the $5.00 retail license. If any store sells less than $1,000.00 worth of insecticides &c., then that particular store is not liable for any license.

A license taken out by the manufacturers will not exempt from license the jobbers and retailers who handle their products. A separate license is levied on manufacturers, wholesalers, jobbers &c., and retailers, and the payment of license by one will not operate to relieve the other of liability.

I return the correspondence attached to your inquiry.

Very truly yours,
HENRY P. WHITE,
Assistant Attorney General.

SHERIFF'S FEED BILLS:—Sheriff on salary not entitled to allowance for preparing and serving. Two jails in one county reported on single statement.

November 12, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

You ask the following questions as to the fees allowed the sheriff of Jefferson County for feeding prisoners in the county jail, under House Bill 3, passed at the Special Session 1920 (Acts 1920, page 28):

First: Is the sheriff of Jefferson County entitled to collect for the county the per capita allowance "for preparing and serving food" to the prisoners?

Second: Shall the feed bills for Jefferson County, where there are two county jails, be rendered separately as to each jail, or as a consolidated statement for the entire number of prisoners in both jails?

In answer to the first inquiry, I beg to advise that the sheriff of Jefferson County cannot collect the per capita

allowance for preparing and serving such food. The above Act expressly provides:

> "That sheriffs of counties who, under constitutional amendments, are serving for salaries shall not participate in said allowance for preparing and serving such food."

This allowance is for a purely personal service by the sheriff, and where he is on a salary, as is the case in Jefferson County, it is apparently assumed that the salary fixed is sufficient to compensate him for his service.

In answer to the second inquiry, I beg to advise that one consolidated bill, covering the entire number of prisoners in both jails, should be rendered by the sheriff of Jefferson County. The allowance for food is graduated according to the entire number of prisoners. The amount of food necessary to feed fifty persons is the same, whether all are incarcerated in *one* jail, or whether they are distributed in different jails. It may be more expensive to prepare and serve the food in two different places, but the entire amount consumed cannot be appreciably increased by this fact. The statute contains no specific provision for a separate enumeration of prisoners confined in separate jails in *one* county. If the Legislature had intended to provide a different rule for Jefferson County, on account of the peculiar condition existing there, it would have used explicit language to that end.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—State pays chairman of board of registrars of Jefferson County per diem only for days actually spent in registering voters.

Hon. H. F. Lee, November 12, 1920.
State Auditor,
Capitol.

Dear Sir:

As to the compensation due the chairman and the other members of the Board of Registrars of Jefferson County, I beg to advise you as follows:

The compensation of the chairman of this board is fixed by Section 37 of the Act passed at the Special Session 1920 (Acts 1920, p. 124). This section, which applies only to Jefferson County, provides:

> "He (the chairman) shall receive a salary of twenty-four hundred dollars per annum. For each actual working day spent by the chairman of the board of registrars for the purpose of registering voters, the State shall pay the amount paid other registrars. The balance of his salary, after deducting the amount so paid by the State, shall be paid out of the funds of the county treasury in the same manner as other county officers are paid."

Under this section, the State only pays the chairman for the number of days actually spent by him in *registering voters*, and does not pay any per diem for his attendance on other sessions of the board. The chairman, unlike the other members of the board, receives an annual salary for his services, payable out of the county treasury; and it is the evident intention of this Act that the State shall be liable only for the time actually spent by the chairman in registering voters. The balance of his salary, after deducting the per diem paid by the State for this particular service, must be paid out of the county treasury.

The other members of the board of registrars are paid by the State as all other registrars are paid. We have previously advised you as to the compensation they are entitled to receive.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

JURY CERTIFICATES:—Receivable in payment of taxes due for general county purposes.

Hon. E. C. Robinson, November 12, 1920.
Tax Collector,
Athens, Alabama.

Dear Sir:

You ask our opinion as to whether you can receive jury certificates in payment of taxes.

Section 6657 of the Code of Alabama of 1907, as amended by Acts 1919, page 39, provides that grand and petit jurors' certificates "shall be receivable in payment of county taxes, and any other county dues." This quoted provision, with only slight changes, has been the law since the Code of 1852.

"County taxes" referred to in the statute means taxes due the county for general county purposes, and does not include any *special* taxes of any kind. Such certificates cannot be accepted in payment of any special school taxes, or road or bridge taxes; nor can such certificates be accepted in payment of any state taxes of any character.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSE ON TALKING MACHINE DEALERS:—Schedules overlapping in one item do not repeal each other.

November 13, 1920.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

You ask whether Senate Bill No. 20, amending Schedule 85 of the Revenue Law, passed at the Special Session of 1920 (Acts 1920, page 139) operates as a repeal of Schedule 4 of said Revenue Law.

Schedule 85, as it was originally and as it now is after being amended, levies a license on the business of selling, etc., pianos, organs, talking machines, small musical instruments, or all such articles.

Schedule 4 of the Revenue Law levies a license on the business of selling adding machines, cash registers, typewriters, talking machines, dictaphones, phonographs, victrolas, grafanolas, or similar machines, in counties having a population of more than sixty thousand inhabitants.

We have previously ruled that Schedule 4 of the License Law of 1915 (Acts 1915, p. 491), which levies a license on the same articles enumerated in Schedule 4 of the present Revenue Law, was not repealed by the law of 1919, but is still applicable to all counties having a population of less than sixty thousand.

If there is any conflict between Schedules 4 and 85 of the Revenue Law of 1919, it existed from the enactment of the law and is not the result of the amended Act passed at the Special Session. The amended act rewrites *ipsissimis verbis* the provisions of the old law which are now supposed to be in conflict with Schedule 4. So, if there was ever a field of operation for Schedule 4, the same field, neither enlarged nor diminished, exists now.

The two schedules, it seems to me, cover entirely distinct businesses. Only one article—"talking machines"— is included in both schedules. The other articles enumerated in Schedule 4—adding machines, cash registers, typewriters, etc.—could not by any stretch of language be included among the articles named in Schedule 85. The Legislature has evidenced a clear intent that dealers in adding machines, etc., should be subject to the license levied by Schedule 4, and I see no reason to render ineffective its intent merely because the two schedules overlap in only one instance.

I conclude, therefore, that Schedule 4 of the Revenue Law of 1919 and schedule 4 of the License Law of 1915 (with the modification above noted) are still in full force and effect.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—County commissioners court must comply strictly with statutes in letting contracts for road construction, and all proceedings must be recorded.

November 15, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

As a preliminary to a more specific answer to your several inquiries, it is well to bear in mind the following propositions which seem settled law:

First: "While a county has corporate characteristics, it is in no sense a municipal corporation, but a mere governmental auxiliary or agency, possessing no power and sub-

jected to no duty, not originating from the statute creating it."

Askew v. Hale County, 54 Ala. 639.

Second: All parties contracting with counties, or their agents, are presumed to know the law and are charged with knowledge of the authority of all agents and the scope of their power to bind the county.

1 Elliott on Contracts, Sec. 602.

Third: The Commissioner's Court or Board of Revenue, is a court of record, and its action in authorizing a contract with the county, or in allowing or disallowing a claim against the county, must appear as a matter of record.

Code 1907, Section 3306.
Speed v. Cocke, 57 Ala. 209.
Crenshaw County v. Sikes, 113 Ala. 626.
Franklin County v. Richardson, 79 Sou, 384.

As said by Chief Justice Brickell in Speed v. Cocke, supra:

> "The court of county commissioners is, by statute, declared a court of record. The judge of probate is the principal judge, the keeper of its records, and required to record its proceedings. A duty with which it is charged is the audit and allowance in term time of claims against the county, which must be presented to the court within twelve months after they accrue or become due. * * * The policy of the statute is to subject all claims to the scrutiny of the court of county commissioners, through whose agency such claims must be created, and the exemption of the county from litigation involving them. * * * The allowance of the claim must be a *matter of record.* A court of record speaks only through its records. A written memorial is the only evidence which other courts can receive of its proceedings, whether it is of the exercise of judicial power, or of mere ministerial authority and duty."

Fourth: The registry of an allowed claim in a book kept for that purpose is a mere memorandum, intended for the purpose of convenient reference for information as to the

character, amount and time of allowance of claims which passed the audit of the court.

Again quoting from the opinion of Chief Justice Brickell in Speed v. Cocke, supra:

> "The statute requires that the commissioner's court shall keep a registry of claims which it may allow against the county. This registry is not the order of allowance which must appear of record * * * it is rather a brief abstract of the contents of such record."

Fifth: While a county may become liable on an implied contract, if the contract is one which the county is empowered to make, yet, if the manner and mode in which a county shall make a contract be prescribed, the manner prescribed must be pursued.

> 1 Elliott on Contracts, Section 605.
> Montgomery County v. Barber, 45 Ala. 237.
> Brush Elec. L. & P. Co. v. Montgomery, 114 Ala. 433.
> Detroit v. Michigan Paving Co., 36 Mich. 335.
> Detroit v. Robinson, 38 Mich. 108.
> 3 Michie's Digest, page 696.

The above authorities, and the reasoning on which they are based, support me in the following answers to your inquiries:

1. A contract made by the Court of County Commissioners for road or bridge construction, where the cost of the work exceeds $250.00, is illegal, if made without advertising for bids and a bond given by contractor as required by Section 11, Acts 1915, page 576.

> Stone v. Jett-Muths, 85 Sou. Rep. 443.
> Authorities above cited.

The allowance of such a claim by the commissioner's court, or the issuance of warrant, is no protection to the treasurer for paying said warrant.

2. The culvert and masonry work, not being contracted for as required by law, cannot legally be paid for out of the county treasury.

3. A contract for building a concrete bridge, at certain rates for excavation and concrete work, cannot be used to allow the same contractor to build a sewer at the same rates agreed on in the first case; the cost of the sewer construction, as you state, amounting to about $7,000.00. The law does not permit this sort of subterfuge. The first contract, although let as required by law, cannot by any rule of construction include work of entirely different character. The sewer work should have been let by a separate and distinct contract, and after a full compliance with all requirements of law.

It follows, of course, that the issuance or payment of a warrant for this sewer work is illegal.

4. Whether work is done under a so-called "force account," or in any other way, the contract for such work must be made in compliance with law. If the "estimated cost" of the work exceeds $250.00, the contract for such work must be made as required by Section 11 of the 1915 Act above referred to. If not so made, the county cannot legally pay for the work done.

5. Section 11 of the above Act authorizes the court of county commissioners to let a contract to the "lowest reasonable and responsible bidder." The fact that there is only *one* bidder does not deprive the court of its authority. If the court is satisfied that the contract made is a reasonable one and that the bidder is a responsible party, I see no reason why the court cannot act on its own judgment in awarding a contract.

6. The action of the court of county commissioners in letting a contract should appear on the minutes of the court. It may not be necessary to set out the contract *in extenso* on the record, but there should certainly be enough in the minutes to show the letting of the contract and the substance of it. The written record of the court is the only record on which we can safely rely. While the Commissioner's Court, like any other court of record, may amend its record *nunc pro tunc*, so as to speak the truth, no officer has the right to presume that the court has taken any action which does not actually appear on its record.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAX ASSESSORS AND COLLECTORS:—Time for filing bonds.

November 15, 1920.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

As to the time when the newly elected tax assessors and tax collectors must file their bonds, I beg to advise you as follows:

Section 192 of the Revenue Law of 1919 requires tax collectors, before entering upon the discharge of the duties of their office, to execute duplicate bonds in certain amounts; one of such duplicates to be filed and recorded in the office of the judge of probate and the other to be filed in the office of the State Auditor *"on or before the first day of September next after his election."*

Section 35 of the Revenue Law, governing bonds required of tax assessors, contains the identical provision as to the manner of making and time of filing their bonds.

The assessors and collectors were elected in November of this year and they take office in October, 1921. Therefore, according to the express provision of law, their bond must be made and filed on or before September 1, 1921.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

MUSICAL INSTRUMENTS; LICENSE:—Requirement of separate State and county licenses for each branch establishment applies only to dealers in small musical instruments.

November 17, 1920.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

Schedule 85 of the Revenue Law of 1919 was re-enacted at the Special Session in the exact language of the original law, but with this new provision added to it:

"The provisions of this schedule shall not apply to persons selling as a part of their stock in trade Jews harps, harmonicas, banjos, ukeleles, mandolins, guitars, violins, toy phonographs and toy victrolas, the selling price of which does not exceed $10.00. Provided that the license tax on Jews harps, harmonicas, banjos, ukeleles, mandolins, guitars, violins, toy phonographs and toy victrolas, the selling price of which exceeds ten dollars, shall be as follows: In counties having a population of 25,000 or less, ten dollars; in counties having a population exceeding 25,000 but not exceeding 35,000, fifteen dollars; in counties exceeding 35,000 but not exceeding 50,000, twenty-five dollars; in counties exceeding 50,000 but not exceeding 75,000, fifty dollars; in counties exceeding 75,000, one hundred dollars. This shall not be construed to entitle a licensee to maintain branch establishments or stores without payment of regular license for each branch or store, both state and county, required under this schedule."

The original schedule levied a certain license on each person engaged in the business of selling, renting, or delivering pianos, organs, talking machines, *small musical instruments,* or all such articles. The amended schedule does not *in terms* change the original license, except as it applies to the *small musical instruments* specified in the amendment.

It would seem, therefore, that the only change contemplated by the Legislature was as to the license on small musical instruments. The re-adoption of the old law as originally written, and without any reference in the amendment itself to the other articles named in the schedule, reenforces me in this conclusion. The very language of the last sentence in the amended law indicates that it applies to the new license on small musical instruments. Immediately after fixing this particular license, the Legislature adds:

"*This* shall not be construed to entitle a licensee to maintain branch establishments or stores without payment of regular license for each branch or store, both State and county, required under this schedule."

The legislative mind was directed to one subject only, the licensing of small musical instruments, and the language used must be construed with reference to the object in view.

Again, if this last provision is interpreted as applying to all licenses levied by Schedule 85, the schedule itself will contain conflicting provisions. After levying a license on dealers in pianos, organs, etc., the schedule provides:

> "But this license shall not apply to merchants or dealers having one or more permanent places of business in this state and keeping any of said articles as a part or all of their stock in trade. Such merchants or dealers keeping any such articles as a part or all of their stock in trade shall for the same pay to the State *one annual license* of one hundred dollars, which may be paid in any one of the counties in which said permanent place or places of business is or are established, and the payment of such license in such county shall be sufficient for all other counties in which they may do business or sell or offer for sale such articles."

The requirement in the amended law for a separate state and county license for each branch establishment or store, if construed as applying to dealers in pianos, organs, etc., would nullify the last quoted provisions of the schedule. All parts of the law must be given effect, if possible. To do this, I am forced to the conclusion that the requirement for separate state and county licenses for each branch establishment or store applies *only* to dealers in the small musical instruments enumerated in the amendment. The other provisions of the law, as to the other articles in the schedule, remain unchanged and unaffected.

I beg to advise you, therefore, as follows:

First: A dealer in the specified small musical instruments must pay a separate *State* and *county* license for each separate store or establishment.

Second: A dealer in pianos, organs, etc., who has one or more permanent places of business in this State, and keeps such articles in stock, must pay *one state license* of one hundred dollars. He must, however, pay the *county* license required by Section 362, in each county in which he does business, or sells, or offers for sale, such articles.

It is apparently the purpose of this provision to favor the local dealer, who has a permanent place of business in this State, by requiring of him only *one State* license. Whereas, outside dealers, or persons with no established place of business in Alabama, are required to pay a State license in each county in which they do business.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

STATE FIRE MARSHAL:—Enforcement of orders.

November 22, 1920.

Hon. W. J. Williams,
State Fire Marshal,
Capitol.

Dear Sir:

Sections 8 of the State Fire Marshal Act (Acts 1919, page 1013), provides in part as follows:

> "The State Fire Marshal, his deputies or assistants, upon the complaint in writing of any citizen, or whenever he or they shall deem it necessary, shall inspect at all reasonable hours any and all buildings or premises within their jurisdiction. When any such officer shall find any building or other structure, which for want of repairs, lack of sufficient fire escapes, automatic or other fire alarm apparatus, or fire extinguishing equipment, or by reason of age and dilapidated condition, or from any other cause, is especially liable to fire, and which is situated so as to endanger life or property, * * * he or they shall order the same removed or remedied, and such order shall be immediately complied with by the owner or occupant of such premises or building; such *owner* or *occupant may*, within five days, appeal to the chancery court of the county in which the property is located, which shall within ten days review such order and file a decision thereon, and unless by the authority of said court the order is revoked or modified, it shall remain in full force and be complied with within the time fixed in

> said order or decision of the chancery court. Provided, that any such owner or occupant who feels himself aggrieved by any such order or affirmed order, may within ten days after the making or affirming of any such order by the chancery court, file his petition for certiorari and supersedeas with the Court of Appeals to review such order or judgment."

Under the state of facts submitted by you, the owner who has been duly ordered to remedy a dangerously defective roof, has simply failed to comply with your order, without seeking to have it revoked or modified in the manner prescribed by the statute. The owner thus, by mere inaction, endeavoring to nullify the order, or force the State to take action to make it effective.

The statute in terms only allows the *owner* or *occupant* to proceed in chancery. This does not and cannot mean that the State is remediless, where the owner or occupant fails to avail himself of the remedy afforded him. On the contrary, I think it is the purpose of the law to put the onus of action on him, and if he fails to act, then the original order of the Fire Marshal is automatically operative and effective.

Section 16 of this law provides:

> "It is hereby declared that this Act is necessary for the public safety, peace, health and welfare, is remedial in nature, and shall be construed liberally."

Your order, while operative and in full legal effect, is not, of course, self-executing. The statute not prescribing the particular procedure to be followed in this case, the State, under familiar principles, may ask a court of equity to enforce its order.

In order that the lien against the property may be effective, I suggest that you serve a new order on the owner or occupant, and at the same time file a copy of said order in the probate judge's office.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CORPORATION FRANCHISE TAX:—Preferred stock treated same as common stock for purposes of assessment and reduction.

November 26, 1920.

Hon. John S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

Several opinions recently rendered by this office set out at length our rulings as to the right of a corporation to reduce its "capital stock," the method necessary to be pursued in effecting a reduction, and the consequence of a non-compliance with the plan prescribed. We also advised you fully as to the franchise tax and the ad valorem tax due by corporations on their shares of stock.

Your inquiry now is whether our former opinions are applicable to issues of "preferred stock." That is to say, whether "preferred stock" is considered just as "common stock" in fixing the franchise tax or the ad valorem assessment of shares of stock; and whether such "preferred stock" can only be retired in the manner prescribed for retiring other stock.

The manner of issuing "preferred stock" and the amount authorized to be issued are prescribed by the Constitution and statutes.

Section 237 of the present Constitution, which is copied verbatim from the Constitution of 1875, provides:

> "No corporation shall issue preferred stock without the consent of the owners of two-thirds of the stock of said corporation."

Section 3479 of the Code of 1907 authorizes the issuance of preferred stock by a vote of two-thirds in value of the capital stock, paid for in cash or property, at a meeting of the stockholders called for that purpose; but limits the amounts of the preferred stock to not more than "two-thirds of the capital stock."

Construing this statute, Judge Bricken, in Citizens Loan & Savings Bank v. Arwood, 81 Sou. Rep. 855, says:

> "The plain purport and effect of the statute is to permit the issue of preferred stock only in the ratio of

two shares of preferred stock to three of common stock paid for in cash or property, and any issue in excess of this ratio is void."

See also:

Randle v. Walker, 84 Sou. Rep. 554.
Heide v. Capital Sec. Co., 200 Ala. 397.

Preferred stock, once issued in compliance with law, becomes a part of the capital stock of the corporation and subject to taxation in the same way as other stock. It differs from other capital stock only in preference given as to dividends.

State v. Cheraw & C. R. Co., 16 S. C. 528:
Sternbergh v. Brocke, (Pa.) 24 L. R. A. (N.S.) 1078.
3 Word & Phrases (2nd Ed.), pp. 1136-1137.
6 Words & Phrases (1st. Ed.), p. 5500.
6 Fletcher Cyc. Corporations, pp. 6026 et seq.

It seems plain on principle and from the language of the law itself that Section 3480 of the Code of 1907, prescribing the method of reducing capital stock, applies to all classes of capital stock. In the very words of the statute:

"Such decrease may be effected by retiring or reducing *any class of stock, etc.*"

Without repeating our former rulings, which you have in your files, we advise you that such rulings are applicable to all "capital stock" assessments, including, of course, any issues of "preferred stock."

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

ELEEMOSYNARY INSTITUTIONS:—County may not appropriate funds in aid of private institution.

November 26, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You ask whether the Board of Revenue of Jefferson County can legally make appropriations from the public funds of the county in aid of certain named institutions.

I call your attention to Section 94 of our Constitution.

> "Section 94. The Legislature shall not have power to authorize any county, city, town, or other subdivision of this State, to lend its credit, or to grant any public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association or company, by issuing bonds or otherwise."

This provision, copied from the Constitution of 1875, was intended to prevent the prostitution of public funds to private enterprises—however worthy in themselves such private enterprises may be. The lesson learned in Reconstruction days was not lost and to render a repetition of those occurrences impossible the inhibition was written into the Constitution.

See: Garland v. Board of Revenue, 87 Ala. 223.

I conclude, therefore, that Jefferson County has no legal right to appropriate any of her public funds in aid of any private individual, institution, association, or corporation.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

WORKMEN'S COMPENSATION:—The State is not an employer, within the terms of the act.

November 27, 1920.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Ala.

Dear Sir:

In answer to your inquiry, I beg to advise you that I can find no law which requires or permits the State to take out employers' liability insurance for the protection of its employees.

Aside from the doubtful validity of such a law, the Workmen's Compensation Act (Acts 1919, p. 206) indicates clearly that the State nor any political subdivision thereof was intended to be included within the meaning of the term "employer" as used in this Act. Section 8 of this Act provides in part as follows:

> "This Act shall not be construed or held to apply to any common carrier (doing an interstate business) while engaged in inter-state commerce, or to domestic servants, farm laborers, or to any county, city, town, village, or school district."

Section 30 permits every employer who accepts the provisions of this act to take out employer's liability insurance.

Section 36 (d) defines "employer":

> "The term 'employer' as used herein shall mean every person not excluded by Section 8 who employs another person to perform a service for hire, and to whom the employer directly pays wages, and shall include any person or corporation, co-partnership, or association or group thereof, etc."

It is clearly the purpose of this law to afford employees a simple and adequate remedy for the collection of compensation for injuries received by them while engaged in their work. As to the employer, it substitutes one liability for another. As the State cannot be sued without its consent, and as no liability has ever existed against the State on account of any injuries suffered by its employees, I am sure

that the State is not an employer within the meaning of the Act.

Constitution 1901, Section 14.
Comer v. Bankhead, 70 Ala. 492.
White v. Ala. Insane Hospital, 138 Ala. 479.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

STATE ROAD BONDS:—Counties may not invest public funds in bonds.

November 27, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You ask whether a county may legally buy State Road Bonds.

Public money raised by taxation can only be expended in the manner and for the purpose prescribed by law. As "public office is a public trust," so, in the same sense, public funds are a "trust fund" which can be expended only in the manner authorized by law.

I can find no law which expressly or by implication permits a county to invest public funds in bonds or securities of any kind. A county is not a *trading corporation.* Public funds can only be used for particularly authorized public purposes, and not for purposes of speculation or investment.

Eufaula v. McNab, 67 Ala. 588.
Garland v. Board of Revenue, 87 Ala. 223.
Mobile County v. Williams, 180 Ala. 639.
3 Michie's Digest, page 695.
Constitution 1901, Section 94.

I conclude, therefore, that a county has no authority to invest its funds in State Road Bonds.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC HIGHWAYS:—County may not split a contract into two parts to evade requirement as to advertising for bids.

November 30, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You state the following facts: A county buys paving material in the open market from a paving company and at the same time makes an agreement with the same company to superintend the laying of such pavement.

Your inquiry is whether the cost of the material alone is to be considered in determining whether the contract is in excess of $250.00, or whether the entire transaction should be considered as *one* contract within the meaning of Section 11 of the Highway Act of 1915. (Acts 1915, p 576.)

This section provides:

> "That no contract where the estimated cost of the work shall exceed two hundred and fifty dollars shall be made except after advertisement for thirty days, etc."

On the above state of facts, this is obviously one single transaction, and the splitting of the contract into two parts is evidently for the purpose of evading the mandatory requirement as to advertising. The law will not permit the doing indirectly of an act which cannot be legally done directly.

We do not mean to hold that a county cannot bona fide make two separate contracts covering one road construction project, one for the material used and the other for the work and labor done. The facts submitted by you do not show a bona fide transaction of this kind.

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

FERTILIZER LICENSE:—Corporation with more than one place of business in State liable for only one license.

December 1, 1920.

Hon. M. C. Allgood,
Commissioner of Agriculture,
Capitol.

Dear Sir:

Section 25 of the Code of 1907 requires an annual license fee of one dollar from "every person, firm, corporation, or association of persons" before offering any fertilizer for sale in the State of Alabama.

Section 26 of the Code provides that the printed report of the Commissioner, or a certified copy of the record in his office, showing the issuance of the license, is presumptive evidence of the fact that said license was issued to such person.

Your inquiry is whether a person or corporation who has more than one place of business in Alabama should take out a separate license for each place of business, or only one license for the entire State.

The requirement of more than one license from one person can only be read into the Act by construction, for there is no express provision to that effect in the law itself. It is said, however, that the officers charged with the enforcement of the Act have consistently construed it as requiring a separate license for each separate place of business.

Contemporary construction and official usage for a long period of time, by the person charged with the administration of the law, are among the legitimate aids in the interpretation of statutes. Wetmore v. State, 55 Ala. 198. But, as said by Judge Pelham, in Bozeman v. State, 61 Sou. Rep. 606:

> "Where the language of the statute is clear and unambiguous, there is no room for construction, and it is only when the meaning and intent are not obvious that the courts attempt to arrive at the law-makers' intent by considering other matters aside from the language used."

See also:

Birmingham v. Sou. Express Co., 164 Ala. 537.
Bartlett v. Morris, 9 Porter, 266.

The act in question is not a revenue law. It is a regulatory measure, passed under the police power of the State, contains penal provisions, and must be strictly construed. The purpose of the law is well stated by Judge deGraffenreid in Talladega Fertilizer & Mfg. Co. v. Farmers Union Warehouse Co., 56 Sou. Rep. 596:

> "While revenue to the State was an incident to the Act, the real, substantial, moving spirit of the Act, and of all its kindred acts, was the protection of the public against fraud or imposition in the manufacture and sale of this, one of the most important articles of our commerce. The fact that the fee for license required under this Act is only one dollar emphasizes the truth of the proposition that the Legislature, in its enactment, was looking not so much to the revenues of the State as to the general welfare of the people of the State."

See also:

Planters Chemical Co. v. Castillow, 64 Sou. 473.
Bowdoin v. Ala. Chemical Co., 79 Sou. 4.

One license to one person—and the statute does not expressly require more than one license of each person—serves as well the purpose of this Act as a dozen different licenses.

Again, this Act makes it a misdemeanor for any person to sell or offer for sale fertilizer without having complied with the provisions of this Act. Having complied with the letter of the law and taken out *a* license, could a person still be convicted because he had not taken out a separate license for each separate place of business? Or, is his contract for the sales of fertilizer void because he has taken out only *one* license, instead of several?

As above intimated, this law is highly penal in its nature and must be strictly construed; and, in the absence of ex-

press language to that effect in the law, I cannot conclude that more than *one* license is required of *one* person.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

PUBLIC SERVICE COMMISSION:—Contracts making preferential rates may be inquired into by the Commission.

December 9, 1920.

Hon. Sam. P. Kennedy,
President Alabama Public Service Commission,
Capitol.

Dear Sir:

I beg to acknowledge receipt of your letter of December 8, in which you request an opinion from this office relative to your duties in the enforcement of the provisions of the Public Service Act of 1920 (Acts 1920, page 38), so far as the same relates to undue preferences and unjust discriminations growing out of contracts with public utilities.

I beg to advise as follows:

The act in question enlarges the authority, powers, and jurisdiction of the Public Service Commission, so that there is extended to publiuc utilities operating in this State supervision and regulation never contemplated by prior legislative enactment. It appears clearly from the Act that by this enlarged authority, power, and jurisdiction, two principal results were intended to be accomplished: (a) improvement in service, and (b) fair, reasonable, non-discriminatory and non-preferential rates and charges.

To accomplish the latter purpose, the provisions contained in the Act relative to rates and charges would be only partially effectual but for the duty imposed upon the Commission. I refer particularly to Section 29 of the Act of 1920, giving the Commission power to conduct investigations without the filing of complaints.

It stands to reason that preferential and discriminatory contracts have been entered into when not only the customer desires to receive the preference, but where the utility desires to grant the discrimination. It may be that con-

tracts have been entered into which one or the other of the parties would be glad to be relieved of, but that is no concern of the Commission, the Commission being only concerned with the effects that these contracts may have where they result in the enjoyment of preferential or discriminatory rates.

I am therefore of the opinion that even irrespective of Section 29 of the Act, but by reason of the general duties imposed upon the Commission to see that the law is properly enforced, it is your duty to make the inquiry contemplated by your letter, and that any utility refusing or failing to comply with Section 25 of the Act, relative to the filing of contracts embodying rates or service regulations which have not been approved by the Commission, can be required to comply by recourse to the courts. They can likewise be required to comply with any order determining just what rates are not discriminatory or preferential, which the Commission may make in conformity to the provisions of the Act. The criminal provisions of the act would also be effective, if necessary, to accomplish the desired result.

It is entirely proper for the Legislature to invest Public Service Commissions with the broad powers in question, by reason of the legal principle announced in such cases as City of Mobile v. The Bienville Company, 130 Ala. 384; City of Montgomery v. Green, 180 Ala. 332, 187 Ala. 196; Birmingham Water Works Co. v. Brown, 191 Ala. 451; Louisville & Nashville R. R. Co. v. Wilson, 102 Ind. 517; Hilton Lumber Co. v. Louisville & Nashville R. R. Co., 141 N. C. 171; to the effect that public utilities may not discriminate as to rates charged, at least among customers of the same class; and the principle announced in such cases as Union Dry Goods Co.v. Georgia Public Service Corporation, 248 U. S. 272; Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92, to the effect that the power to fix public utility rates and charges is a governmental and not a contractual function.

I beg to call the attention of the Commission to an opinion of this office of date October 13, 1919, which fully covers the power of the Commission to fix just and reasonable rates and charges, notwithstanding existing contracts. This opinion was written before the amended public utility act of

1920. This act is much broader than the act of 1915, which is cited in said opinion.

Yours truly,
J. Q. SMITH,
Attorney General.

SHERIFF'S FEED BILLS:—Actual cost of food plus fixed rate for preparation and serving allowed in all counties where sheriff is not on salary.

December 9, 1920.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

The act regulating the feeding of prisoners in county jails, passed at the Special Session, 1920, of the Legislature (Acts 1920 page 28), fixes the amounts to be paid by the state (1) for the food furnished prisoners and (2) for preparing and serving food to such prisoners.

The allowance in each instance is graduated according to the number of prisoners in jail, but the amount allowed for the *purchase* of food cannot in any case exceed the amount actually *paid* for such food. The allowance for *preparing and serving* such food, scaled according to the number of prisoners in jail, is fixed by law, irrespective of the cost of such *service*.

Section 3 of this act provides in substance:

> "That food for prisoners in the jails, except as otherwise provided by existing law, shall be paid for by the state according to the following scale: When the number of prisoners does not exceed ten, for each prisoner, sixty cents per day, or such part thereof as may be necessary, is allowed." Then follow similar provisions, with reduced per diem allowance per prisoner, where the number of prisoners exceeds ten, twenty, or forty, as the case may be. There is then this allowance for *preparing and serving the food*: "In addition to the above amount, there shall be allowed the sheriff for preparing and serving food ten

> cents per capita for each prisoner up to and including twenty; seven and one-half cents a day per capita for each prisoner in excess of twenty up to and including forty; and five cents a day per capita for each prisoner in excess of forty up to and including fifty, but there shall be no further allowance for any number of prisoners in excess of fifty."

The error in the printed act is probably self-correcting, but it is well to note, in passing, that my quotation from Section 3 is copied from the enrolled act and a comparison between it and the printed act will disclose the typographical error in the *printed* act.

Section 3 further expressly provides:

> "That sheriffs of counties who, under constitutional amendments, are serving for salaries shall not participate in said allowance for preparing and serving such food."

In an opinion rendered by this office to State Auditor, H. F. Lee, on November 12, 1920, we held with reference to the allowance for serving food:

> "This allowance is for a purely personal service by the sheriff and where he is on a salary, as is the case in Jefferson county, it is apparently assumed that the salary fixed is sufficient to compensate him for this service."

We ruled, therefore, that a sheriff serving for a salary, under a constitutional amendment, was not entitled to the per capita allowance for preparing and serving food.

Section 4 of this act requires the sheriff of each county, on or before the 10th day of each month, to furnish to the court of county commissioners, or board of revenue, to the State Auditor, and to the State Prison Inspector, an itemized statement as to the prisoners in jail, and the amount of money expended for purchasing and supplying foodstuffs for such prisoners, during the preceding month.

Section 5 of this act authorizes the State Auditor to draw a warrant in favor of the sheriff "for the amount so ex-

pended for feeding said prisoners." But, if the statement filed by the sheriff shows an expenditure in excess of the allowance fixed by Section 3, then the State Auditor shall draw his warrant only for the amount allowed by Section 3.

It seems to appear from the plain provisions of this act:

First: The State can allow only the amount actually expended for the purchase of food, and in no event more than the amount fixed by Section 3.

Second: The allowance in Section 3 for preparing and serving food to prisoners is intended to cover such expenses incident to this service, as pay of cook and helpers. This allowance, unlike the allowance for the *purchase* of food, is an arbitrary, fixed amount which, in one case, may be more and, in another, less than the *actual cost* of such service.

Third: The allowance for preparing and serving food does not apply to any county where the sheriff is serving for a salary, under a constitutional amendment.

Very truly,
J. Q. SMITH,
Attorney General.

MONEY LENDER'S LICENSE:—Only one license required for two offices in same county.

December 11, 1920.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

You ask whether the Black Loan Company, which has two business offices in Talladega county—one at Talladega, and the other at Sylacauga—is liable for *one* or *two* money lender's licenses under schedule 70 of the revenue law of 1919 (Acts 1919, page 419). This schedule provides:

> "Every person, firm, or corporation, whose principal business is lending money, shall pay an annual license of one hundred dollars, and this schedule shall apply to all persons engaged in business, whether organized under the laws of this State or any other state or

country, but shall not apply to banks or banking institutions regularly organized as such. *The payment of the license in one county of the state, as evidenced by the license or official certificate of the judge of probate, shall be sufficient; provided, however, that if an office is maintained in more than one county the license shall be payable in each county where an office is maintained.*"

There is no question whatever as to the liability of this company for a money lender's license. The only inquiry is whether this company is subject to *two* licenses because it maintains two separate offices in the same county. The italicized portion of the above schedule indicates the question raised.

The law itself in express terms exacts an *annual* license from each person, etc., whose principal business is lending money, and specifically stipulates that "the payment of *the* license in one county . . . shall be sufficient." There is a further proviso "that if an office is maintained in more than *one* county, the license shall be payable in *each county* where an office is maintained."

The language of the law, therefore, clearly shows that only *one license* is required in *one county;* and that the payment of one license in one county is sufficient to allow the lending of money in all counties of the State, except only where the money lender maintains an office in another county. In the instance last named, the money lender must take out a separate license in each county where he maintains an office.

It is suggested, however, that this schedule must be construed in connection with Section 363 of the revenue law. This section provides the method for the issuance of licenses by the probate judge and among other things prescribes that the license issued shall state the name of the street or location where it is proposed to carry on the business licensed, and that the license issued shall not authorize the holder to carry on business at any other location.

This argument must mean that all licenses issued under the revenue law are restricted to *one* place of business.

This contention cannot be sustained. The licenses on auctioneers, automobiles, bill posters, dentists, doctors, law-

yers, lightning rod agents, traveling photographers, peddlers, etc., is, of necessity, not restricted to *one* designated place of business. There are many licenses levied, either expressly or by necessary implication, on each separate place. The license on garages, gasoline filling stations, barber shops, bowling alleys and dealers in cigarettes are some instances of this kind.

Wherever it appears expressly, or by necessary inference, that the legislature levied the license on the *place* of business, rather than on the person transacting the business, we must hold that a separate license is required for each separate place of business. This holding, however, will be because of the language of the law *levying* the license, and not because of the form prescribed by Section 363 for *issuing* the license.

This last named section, so far as it requires the designation of the place of business, has a field of operation, applying to all licenses required of each separate place of business. This section, in its entirety, as already shown, cannot apply to all licenses levied by the revenue law. Nor, we think, can the general language of this section expand the explicit restriction in schedule 70. This schedule expressly says that the payment of *the* license in one county is sufficient. It further stipulates that *the* license shall be payable in each county where an office is maintained. There is nowhere in the schedule a requirement that a license shall be levied on each office or each place of business. In fact, the language of the law expressly excludes this conclusion.

The revenue law makes it a misdemeanor for any person to carry on a business without taking out the license required by the act. In an opinion recently rendered by this office as to the license required of fertilizer companies, we said:

> "Again, this act makes it a misdemeanor for any person to sell or offer for sale fertilizer without having complied with the provisions of this act. Having complied with the letter of the law and taken out *a* license, could a person still be convicted because he had not taken out separate licenses for each separate place of business?"

The above quoted language is applicable to the question we are answering.

I conclude, therefore, that the Black Loan Company is subject to only *one* license in Talladega County.

Yours truly,
HENRY P. WHITE.
Assistant Attorney General.

TRIAL TAX:—Not levied in cases of settlement under section 12 (b) of Workmen's Compensation Law.

December 13, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You ask whether the $3.00 trial tax must be collected where the settlements are made under Section 12b of the "Workmen's Compensation Act," (Acts 1919, page 210) this section expressly providing that the costs of the proceedings, which shall be borne by the employer, shall not exceed $2.00.

It will be noted that Section 12b is confined to those cases where the interested parties have reached an agreement of settlement, and they appear before a judge of the Circuit Court, or a probate judge, for the purpose of approving the agreement. It is not litigation in the ordinary sense of the word. The controversy between the parties has been closed and the judge is asked by both sides to render judgment for the agreed sum.

Section 4½ of the revenue law (Acts 1919, page 284) imposes a trial tax of $3.00 in each case, civil, criminal and equity, "to be taxed and collected as other costs." This necessarily implies an adversary proceeding and a losing party against whom costs can be legally taxed.

In view of the express language of Section 12b, limiting the entire costs to two dollars, and in further view of the almost necessary inference that Section 4½ applies to adversary proceedings, where costs are taxed against the losing party, I am of the opinion that the $3.00 trial tax

cannot be collected in the cases covered by Section 12b of the "Workmen's Compensation Act."

Yours truly,

HENRY P. WHITE,
Assistant Attorney General.

COSTS:—Fee for seizure in prohibition cases allowed in county courts.

December 14, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

Section 6655, Code 1907, deals specifically with officer's fees in transactions before the county court. McFountain v. State ex rel, Russell, 83 Sou. 53. That section provides that, "In prosecutions before the county court the following fees shall be allowed for the *services specified*, and none other." The fee allowed officers by Section 14 of the "Act to further suppress intemperance," approved September 25, 1915 (Acts 1915, p. 557), is a fee for making seizure of prohibited liquors and is not for a "service specified" by Section 6655 of Code 1907. As it is not for a "service specified" but an entirely new service, there is no reason for holding that the Legislature did not intend for this fee to be taxed in county courts. Such a contention is negatived by the provision of the Act requiring it to be taxed in the "court possessing jurisdiction." There is no conflict between Section 6655 of Code and Section 14 of the Act. The fee for seizure was properly taxed in the county court if the facts existed justifying the same.

By virtue of the provisions of an act approved September 29, 1919, sheriffs are allowed the same fees in county courts as allowed by law to him for similar services performed in the circuit court. Acts 1919, p. 1030.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—Compensation for preparing lists furnished to election inspectors.

December 14, 1920.

Hon. Charles E. McCall,
Chief Examiner Public Accounts,
Capitol.

My dear Sir:

Under the act of 1915 entitled "An act to provide for the registration of electors," the probate judge of a county is not entitled to any compensation for furnishing lists of the qualified voters to election inspectors. For the preparation by him of the official list of voters for publication, he is entitled to five cents for each name appearing on such list. (Acts 1915 page 239, Section 14.)

The act approved October 2, 1920, relative to the registration of electors makes no provision for compensating directly the probate judge for preparing and furnishing lists of qualified voters to election inspectors. It does, however, provide for the payment of clerical assistants necessary to the preparation of such lists.

It was proper under this section to allow payment out of the country treasury of clerical assistants necessary for the preparation of the list for the election inspectors of the general election held November 2, 1920. (Act approved October 2, 1920, Sections 19 and 36.)

There is no provision requiring the county treasurer to furnish lists for the election inspectors, nor is there any allowance to such officer of compensation for performing such a duty. It is possible that he could be compensated if he performed such duties as a clerical assistant to the probate judge, and not in his official capacity as county treasurer.

Very truly yours,

HARWELL G. DAVIS,
Assistant Attorney General.

MOBILE COUNTY FINE AND FORFEITURE FUND:—Solicitor's fees should be turned into State treasury.

December 24, 1920.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Section 6634 of the Code of 1907 provides in part as follows:

> "Solicitors are entitled to the following fees, to be taxed against the defendant, on conviction, and if he is insolvent, to be paid out of the fines and forfeitures in the county treasury, etc."

The above quoted language is identical with the provisions of Section 4561 of the Code of 1896 and Section 4868 of the Code of 1886.

Your inquiry is whether the act regulating the fine and forfeiture fund of Mobile County (Acts 1890-91, page 9,) relieves Mobile County from the payment of solicitors' fees into the State treasury.

In my opinion, the act in question expressly negatives such a construction. This act provides in substance:

First: That the fine and forfeiture fund of Mobile County shall be covered and paid into the county treasury and shall be used and treated in all respects as the funds of Mobile County.

Second: That all claims now existing, or which may hereafter accrue, *that are by law charges against the fine and forfeiture fund of Mobile County* shall be paid out of the treasury of Mobile County.

Third: That it shall be the duty of the county treasurer to keep a separate account of all moneys arising from said fine and forfeiture fund, and all moneys paid out on claims hereafter accruing, except the salary of the judge of the City Court of Mobile.

Fourth: There is also a provision for the registry and payment of outstanding claims against said fine and forfeiture fund and fixing the order of priority in paying said *outstanding* claims.

At the time of the passage of this act, the solicitor's fee, in the instance named in the above quoted Code provisions,

was a legal charge against the fine and forfeiture fund of Mobile County. It has by all subsequent enactments of the legislature continued to be a legal charge against said fund. The act in question expressly requires that all such claims shall be paid out of the treasury of Mobile County.

The act in question was apparently passed for the primary purpose of requiring registry of *outstanding* claims, in order to fix the priority of their payment, and not to merge the fine and forfeiture fund with the general fund of the county. In fact, the act expressly requires the county treasurer to keep *a separate account* of all moneys arising from said fine and forfeiture fund. The general provisions of the law relating to the fine and forfeiture fund are applicable to Mobile County, except only as changed by the Act of 1890-91. The changes made by this act do not affect Sections 6634 and 7796 et sequitur of the Code of 1907.

The circuit clerk of Mobile County should, therefore, collect these solicitor's fees from the treasury of Mobile County and make remittance to the State Treasurer as required by the provisions of the Code.

Brown v. Parris, 93 Ala. 314.
Sessions v. Boykin, 78 Ala. 328.
Palmer v. Fitts, 51 Ala. 489.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Moneys may not be paid out under void acts.

January 15, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The act approved September 30, 1919, (Acts 1919, page 867) fixing the salary of the Deputy Solicitor in counties having a population of not less than 26,940 and not more than 27,000 applies only to Shelby County. The classification used in this act is arbitrary and not reasonably related to the purpose to be effected. The law is local. Inasmuch

as the notice required by Section 106 of the Constitution was not given, the act is void and of no effect.

Larkin v. Simmons, 155 Ala. 273.
State v. Sayre, 142 Ala. 641.

A void statute cannot serve to create any right and any salary drawn by reason of the provisions of this law, was drawn without any legal authority therefor.

The paying out of county funds under an unconstitutional act is the same as paying out funds without any act, so far as civil liability is concerned. An unconstitutional and void act can furnish no protection to any one.

Norwood v. Goldsmith, 168 Ala. 224; 53 Sou. 84.
Mobile County v. Williams, Judge, 180 Ala. 639; 61 Sou. 963.
City Council of Montgomery v. Reese, 149 Ala. 188; 43 Sou. 116.

As no action has been taken by the Board of Revenue seeking to relieve the Solicitor of Shelby County of this liability, this office would not be justified in expressing an opinion as to the probable effect of such action. Therefore, the latter part of your letter is not answered.

Yours very truly,
HARWELL G. DAVIS,
Assistant Attorney General.

APPROPRIATIONS:—For printing copies of official documents for Department of Archives.

January 18, 1921.

Mrs. Marie B. Owen, Director,
Department of Archives and History,
Capitol.

Dear Mrs. Owen:

I beg to acknowledge receipt of your letter of January 7th, in which you wish to be advised as to how payment should be made for the printing of 250 copies of all Departmental and Executive reports, bulletins, circulars,

etc., as provided in the acts of the Legislature, 1915, page 738.

I am of the opinion and so advise that for the printing done under this act of the Legislature, the payment should be made out of the appropriation as provided in Section 5 of an act of the special session of the Legislature of 1920, approved Oct. 5, 1920, page 121.

Yours truly,
J. Q. SMITH,
Attorney General.

PROHIBITION LAWS:—Cost of keeping condemned property pending sale deducted from proceeds.

February 7, 1921.

Hon. G. N. Cofield,
Sheriff,
Wedowee, Ala.

Dear Sir:

The Attorney General has referred to me your letter of the 4th instant.

In Section 13, Acts 1919, page 13, under which the condemnation of the mule and buggy referred to in your letter was made, provides as follows:

> "The proceeds of the sale of any such property forfeited to the State, whether sold by court decree or by an officer under advertisement, shall after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, be applied as follows:"

It will be observed from the language of the statute above quoted, that provision is made for keeping of the property pending the proceedings, out of the proceeds of the sale. If, however, the proceeds of the sale be insufficient to cover the costs of keeping the property pending the proceedings, there is no provision for payment for the keeping of such property.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

DEPUTY SOLICITOR:—Salary a preferred claim and should be paid from fund set aside during fiscal year in which incurred.

February 18, 1921.

Hon. J. C. Nichols,
Deputy Solicitor, Cleburne County,
Heflin, Alabama.

My dear Sir:

In compensation for service the deputy solicitor is required by law to render the county, he is allowed a salary which is in lieu of all solicitor's fees, such fees going to the county treasury. This salary is payable out of the county treasury. (Acts 1915, page 830, Section 5.)

The act approved September 30, 1919, makes this salary of the deputy solicitor for services required by law and performed for the county a preferred claim, which with other claims specified in the statute are to be preferred in payment to all other claims except special appropriations for the county jail, provided for under Sections 140 (1411) and 143 (1413) Code 1907. (Acts 1919, page 1110.)

The law requires "the county treasurer to set apart a sufficient fund from the moneys of the county" for the payment of claims of this particular class. Such claim, however, should be paid out of the fund set aside during the fiscal year in which the claim becomes payable for the payment of such preferred claims. Preferred claims which become payable during one fiscal year are not payable out of the funds set aside during a subsequent fiscal year to pay claims of the same character and class.

Allen v. Watts, 88 Ala. 497.

My conclusion may be summarized as follows: The salary of the deputy solicitor is a preferred claim, subordinate only to the payment of the county jail appropriation hereinbefore mentioned; sufficient funds must be set aside from the county moneys to pay the same; the salary should be paid from the fund set aside during the fiscal year such claim matures as a charge against the county for the payment thereof and cannot be legally paid out of moneys set aside during a subsequent fiscal year for the payment of claims of the same class and character.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

SOLICITOR'S FEES:—Included properly in cost bills from Mobile County against convict fund.

February 25th, 1921.

Hon. Wm. F. Feagin,
State Warden General,
Capitol.

Dear Sir:

I return herewith several cost bills filed by the clerk of the circuit court of Mobile County against the convict fund, arising out of sentences to the penitentiary of the several named defendants.

You are doubtful as to whether the Solicitor's fees, included in these cost bills, are proper charges against the convict fund.

Section 6572 of the Code of 1907 provides that whenever a defendant is convicted, and sentenced to the penitentiary, certain specified items of costs in the case shall be paid out of the convict fund. This section expressly provides:

> "When the conviction is secured by a solicitor other than a solicitor who is paid a salary by the state, *or when the solicitor is paid a salary by the county*, such bill of cost shall also include the solicitor's fee, which is now or may hereafter be allowed by law."

Section 6573 of the Code of 1907 provides that the whole costs paid in any one case shall not exceed one hundred and fifty dollars. None of the cost bills attached to your letter exceed this limit.

The salary of the solicitor, who secured the convictions in these cases, is paid out of the treasury of Mobile County. Local Acts 1907, page 590.

Our Supreme Court, in construing Section 4511 of the Code of 1896, (which contains the identical language quoted above from Section 6572 of the present Code), held that the solicitor's fee, earned by a solicitor who was not paid a salary by the State, was properly payable out of the Convict Fund; and that the issuance of a warrant in favor of the circuit clerk, for the amount of the fee, could be compelled by mandamus.

Trapp v. State, ex rel Roney, 120 Ala. 398.

See also:

Clark v. State, 2 Ala. App. 199,
Redman v. State, 8 Ala. App. 408;
Trapp v. State 122 Ala. 394.

I conclude, therefore, that the solicitor's fee is a proper item to be included in the attached cost bills and should be paid out of the Convict Fund.

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

COFFIN DEALER'S LICENSE:—Due in towns of one thousand inhabitants or less.

March 2, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

You ask for a construction of the following clause of schedule of the License Law of 1919:

> "Each dealer in coffins in unincorporated places or towns of one thousand inhabitants or less, ten dollars."

Your Commission has construed this as meaning that all dealers (1) in unincorporated places, and (2) in towns of one thousand inhabitants or less, are liable for the coffin dealer's license. In short, that all dealers outside of towns and all dealers *in* towns and cities are subject to the license levied by this schedule. This construction is obviously correct.

There is no such thing under our municipal code as an "unincorporated town." Section 1052 of the Code of 1907 provides:

> "All incorporated municipalities containing more than one hundred and less than two thousand inhabitants shall be called towns."

This section further provides that all municipal corporations containing two thousand inhabitants or more shall be called cities.

Schedule 38 was evidently written with these definitions in mind, for the succeeding clause, in classifying the license according to population, correctly designates and distinguishes towns and cities.

"Unincorporated places," as used in schedule 38, applies to *all* places in the State outside of *towns* and *cities*, which are expressly covered by this schedule. It results, therefore, that *all* dealers in coffins are liable for the license levied by schedule 38.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

JUVENILE COURTS:—Have jurisdiction over 14-year-old girl even though married. Delinquent boy arrested by police may be locked up until transferred to Juvenile Court.

March 3, 1921

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

Dear Mrs. Bush:

Your letter of February 24th, enclosing two letters from the chief probation officer of Montgomery County, requests advice from this office on the following questions:

1. Has the Juvenile Court the right to commit to an institution a girl of fourteen who is married but separated from her husband?

2. Have the police the right to lock up a delinquent boy when they arrest him?

Replying to the first inquiry, I do not find that the marriage of a fourteen-year-old girl affects her status, so as to place her beyond the operation of the Juvenile Court Act. She continues to be subject to the disabilities of minority until she reaches the age of eighteen, which is also the age at which the jurisdiction of the Juvenile Court ceases.

Code 1907, Section 4499.

Acts 1920, page 77, Section 2.

As to the arrest and incarceration of youthful offenders, this is dealt with by Sections 12 and 26 of the act establishing the Montgomery County Juvenile Court. (Acts 1920, pages 82 and 91.) These sections provide for the arrest of children, without warrant, in the manner provided by law, but require that they be transferred to the Juvenile Court promptly by the magistrate or court before whom they are brought. Until the transfer is accomplished, the child may be placed in jail for safe-keeping, if the circumstances render it necessary. Of course, they may not be confined in the same room with adult prisoners at any time, before or after the transfer.

Yours very truly,
BERNICE SUMMERS,
Assistant Attorney General.

ELECTIONS:—Expense of primary elections of any party entitled thereto payable by county.

March 3rd, 1921.

Hon. W. D. Nesbitt, Chairman,
State Democratic Executive Committee,
Birmingham, Alabama.

My dear Sir:

An act approved September 22nd, 1915, (Acts 1915 page 722) provides that "all expenses and charges for holding primary elections in this State shall be paid in like manner as fees and charges for holding general elections."

To give to this provision of this act a field of operation it is necessary to hold that it provides for the payment of the expenses of all primaries, because previous to its enactment there was a statute providing for the payment of the expenses of general primaries. (Acts 1915, page 219, Section 8).

Certain sections of this last cited act were amended by the legislature of 1919, but this amendment did not contain, in my opinion, any valid clause repealing the act approved September 22, 1915, which act requires the expenses of all primaries to be paid as are the expenses of general election.

The provisions of the law relating to the payment of the expenses of primaries which are called by the governing power of a political party are rather confusing. It was certainly not intended that two political parties could have primaries upon different dates and the expenses of each be charged against the county, yet there seems to be no provision to prevent the occurrence of just such condition.

In view of this fact it is suggested that the governing bodies of the different political parties which are entitled to hold primary elections under the law of the State of Alabama agree on the date on which such primary should be jointly held by such parties.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

TAXATION:—Escaped property assessed against present owner or "owner unknown."

March 3rd, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

You state the following facts: A house and lot has escaped taxation for six years or more. During this time the ownership of said house and lot has changed several times.

You wish to know whether in making an escape assessment now you should make several separate assessments against the several successive owners, or whether you can simply make *one* assessment against the *present* owner for the entire period.

It is *property* which is assessed and not persons. *After* a legal assessment, the tax due on the *property* becomes a debt of the *owner* collectible by suit; but no *personal* liability for the tax can arise until such an assessment has been made.

Section 58 of the Revenue Law of 1919 (Acts 1919, page 303) provides that "whenever the tax assessor shall dis-

cover that any *property* has escaped taxation" within five years next preceding "he shall list and return said *property* for taxation for the years during which the same has escaped."

Section 224 of the Revenue Law (Acts 1919, page 349) also imposes on the tax collector the duty of assessing escaped property.

It cannot be assumed that the assessing authorities can carry in their heads, or ascertain from inquiry or an examination of the records, the successive owners of any particular piece of property during the preceding five years. In many instances it would be impossible to obtain the information. In all cases it would seriously impede the work of assessment.

The duty is to assess all *escaped property.* If the present owner is known, the assessment should be against him. If the owner is unknown, the assessment should be against the "unknown owner."

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION:—Valuation fixed by tax adjuster in 1920 for biennial period cannot be revised by State Tax Commission after close of tax year 1920.

March 7th, 1921.

Hon. J. S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

The request contained in your letter of the 18th instant for the opinion of the Attorney General upon the question as to whether the State Tax Commission has authority to order a reduction in the assessments of taxes for the tax year 1920 or for the year 1921 has been received. In reply I beg to advise you as follows:

Section 84 of the General Revenue Act (Acts 1919, page 311), provides that whenever any real property shall have been legally valued and legally assessed by the county tax

adjuster, or Board of Tax Adjusters, the value thus fixed shall be and remain the taxable value of such property for a period of two years dated from the first day of October preceding.

In the case of State vs. Doster-Northington Drug Company, 196 Ala. 447, the Supreme Court held that notwithstanding the right of general and complete supervision is given to the State Tax Commission, yet in view of the statutes which relate to and govern the assessment, valuation, and collection of taxes, the power of the State Tax commission to set aside valuations and assessments must be exercised before the end of the current tax year. The authority given to the State Tax Commission under subdivision "m" of Section 138 of General Revenue Act 1919 does not give the State Tax Commission power to re-assess or to re-value property which had been legally assessed and legally valued for the year 1920, under an application of the principles laid down in the case of State vs. Doster-Northington Drug Company, above cited.

With respect to the authority of the State Tax Commission to re-value property for 1921 taxation. It is the opinion of the Attorney General that the authority given the State Tax Commission under subdivision "m" of Section 138 of the General Revenue Act of 1919, is limited by the provisions of Section 84 of this Act, and that the value of real property for taxation as fixed by the County Tax Adjuster as provided in said section 84 remains the valuation of such real property for a period of two years dating from the first day of October preceding and that when such valuation has been determined by the County Tax Adjuster and no proceeding has been begun by the State Tax Commission to alter or revise such valuation before the end of the tax year 1920 the valuation fixed by the County Adjuster shall remain for said period of two years. And that the State Tax Commission is without authority to revise such valuation after the expiration of the tax year 1920.

Yours very truly,

HUGH WHITE,
Assistant Attorney General.

MOTOR TRUCK LICENSE:—Based on tonnage of truck proper, regardless of trailer.

March 7th, 1921.

State Tax Commission,
Capitol.

Gentlemen:

Schedule 7 of Section 361, of the Revenue Law of 1919 (Acts 1919, page 397) levies a license tax on "motor trucks" graduated according to the tonnage capacity of such motor trucks. To quote the exact words of the statute:

> "For each motor truck the following taxes shall be charged: trucks of less than one ton, fifteen dollars; trucks of one ton and less than two tons, twenty-two dollars and fifty cents; trucks of two tons and less than three tons, thirty-seven dollars and fifty cents, etc."

Your inquiry is whether the amount of this license is affected by the fact that trailers are attached to the main body of the motor truck, or whether the license is levied solely with respect to the tonnage capacity of the motor truck proper? Does attaching a trailer to a properly licensed motor truck change the tonnage capacity of that truck, so that an additional license is required? Or, does it create an entirely new and distinct motor truck, with greatly increased tonnage capacity, so as to require an entirely new license for an increased amount?

It is a general rule of construction that the words of a statute are to be taken in their ordinary or popular sense, unless it plainly appears from the context, or otherwise, that they were used in a different sense.

2. Lewis' Southerland Statutory Construction (2 ed.) Section 390;

Crook v. Calhoun County, 144 Ala. 505.

The license tax levied by schedule 7, above quoted from, is on *"each motor truck"* of certain tonnage capacity. It is probably a matter of common knowledge that motor truck manufacturers advertise and sell their trucks at prices based on tonnage capacity. The body of the truck, with the motor as a necessary part of it, is sold to the purchaser as a motor truck of a certain capacity, without reference to

whether trailers may be subsequently attached to the main body. The purchaser of the motor truck, as required by schedule 9 of the Revenue Law, (Acts 1919, pages 398, 399), must apply for and take out a license on such motor truck. According to the letter of the law, this license must be taken out before the purchaser has *used* the motor truck, and before he has even had an *opportunity* to attach a trailer to it. Schedule 7 specifies the *amount* of the license to be paid by him; which license is necessarily based on the *then* tonnage capacity of the motor truck.

This license tax, like all other taxes, should be definitely ascertainable *at the time* of its collection. And, once paid, it should not be subject to subsequent change, in the absence of clear statutory authority.

I am of the opinion, therefore, that the license tax levied by schedule 7 is based on the original tonnage capacity of the motor truck; and that the use of trailers attached to the main body of the truck does not add to or vary the amount of the original license.

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

MORTGAGE TAX:—Not collected on instruments filed in office of Secretary of State.

March 9, 1921.

Hon. W. P. Cobb,
Secretary of State,
Capitol.

My dear Sir:

Your letter of January 26, 1921, contains the following question:

> "Is the payment of the mortgage tax required by schedule 71 of Section 361 of the Revenue Act 1919, to the Secretary of State a condition precedent to recording instruments described in Section 3393, Code 1907, in the office of Secretary of State?"

Schedule 71 of Section 361 of the Revenue Act of 1919, which section contains the License Schedule of the Act,

makes no provision for collecting the license or privilege tax imposed therein by any officer except the probate judge and does not impose the tax except on instruments filed for record with the probate judge.

General Acts Alabama 1919, p. 420.

It follows that on those instruments required by Section 3393, Code of 1907, to be recorded in the office of Secretary of State there is no privilege or license tax imposed by Schedule 71, supra, and the Secretary of State is not authorized to require the payment of such a tax as a condition precedent to recording the same.

The provisions of Section 3393 of the Code and Schedule 71 of Revenue Act 1919 have been in effect for a good many years. It has never been the practice for the Secretary of State to require the payment of the privilege or license tax imposed by said Schedule 71 on instruments required to be filed in the office of Secretary of State by Section 3393 of the Code. Official usage for a long period of time by those charged with the administration of a law should be presumed to be correct unless clearly wrong.

Wetmore v. State, 55 Ala. 198.

Yours very truly,

HARWELL G. DAVIS,
Attorney General.

INSURANCE POLICIES:—Insurance Commissioner requires payment of fee for each certificate and cannot accept unused certificate clipped from policies previously registered.

March 10, 1921.

Hon. A. W. Briscoe,
Commissioner of Insurance,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of February 2nd wherein you make inquiry as to whether you are permitted under the statutes referred to in your letter to accept certificates clipped from policies previously registered in payment of the fee referred to in your letter, or whether you are under the legal duty to collect a fee for

each certificate, refusing to receive in payment certificates clipped from policies previously registered.

Section 2 of the 1909 act referred to in your letter (Acts 1909, page 3), provides that "for each certificate" the Commissioner shall collect one dollar.

This Section 2 of the 1909 Act was amended in 1911 (Acts 1911, page 406), the only change effected by said amendment being the substitution of the words "25 cents" for the words "one dollar." The result therefore of these two statutes, so far as this charge is concerned, is to require the collection of a fee of twenty-five cents "for each certificate."

The express and unambiguous requirement of the statutes is that you collect a fee of twenty-five cents "for each certificate" and you are wholly without authority to accept in payment of a fee of twenty-five cents, a certificate which has been previously executed, as the old certificate in a policy formerly certified by you is not twenty-five cents, and the statute expressly requires you to collect twenty-five cents. If you should certify a number of policies for a company and all of these policies should not be used by the company, and the company should subsequently request you to certify other policies, and tender, in payment of the twenty-five cents required, some of the certificates clipped from the policies which you had previously certified, and you should accept such clipped certificates from policies previously certified in payment of the twenty-five cents fee, you would not be collecting the fee of twenty-five cents "for each certificate," as is expressly required by law.

To state my conclusion in briefer form, you are not authorized under the law, to execute one of the certificates referred to without the collection of twenty-five cents in money, and an old certificate is, of course, not money.

Section 9 of the Act of 1915, (Acts 1915, page 834), does not affect what is stated above. The only bearing which said section has upon the fee above referred to, is to require the Insurance Commissioner, an office created by this act, to collect the same fee which had been previously collected by the Secretary of State, which was a fee of twenty-five cents.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

CORPORATION FRANCHISE TAX:—Attempted dissolution by distribution of assets among stockholders does not defeat liability for franchise tax.

March 10, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state that there are a great many domestic corporations which, without being dissolved in the manner prescribed by statute, have distributed all their assets among their stockholders.

You ask to be advised how the franchise tax, due at the time of this attempted dissolution, and subsequently, can be collected.

It is well settled law in Alabama, as we have heretofore frequently ruled, that " a corporation has no power to increase or diminish its capital stock, unless expressly authorized to do so," and any attempted increase or decrease of the capital stock of a corporation, without express authority therefor, is entirely void. The legislature of Alabama having provided a particular method for increasing or decreasing capital stock, the corporation is restricted to the precise plan provided.

Grangers Life & Health Ins. Co., v. Kamper, 73 Ala. 325.
Heide v. Capital Securities Co., 200 Ala. 399; 7 R. C. L., page 202.
Scovil v. Thayer, 105 U. S. 143.

The capital stock continuing to exist as such, until retired as provided by law, it follows that the corporation's liability for the franchise tax likewise continues to exist.

The liability for the franchise tax is primarily against the *corporation itself*. A stockholder ordinarily is only liable to creditors of the corporation to the extent of his unpaid stock subscriptions. But another principle of law, equally well established, is that "the capital stock and other property of a corporation are to be deemed a trust fund for the payment of the debts of the corporation, so that the creditors have a lien upon, or right of priority of

payment out of it, in preference to any of the stockholders of the corporation."

Adams et al v. Perryman, 202 Ala. 469, and authorities cited in the opinion.

In the Adams case, just cited, the stockholders of a corporation divided all its assets among themselves, without making provision for the payment of *pre-existing debts.* A bill in equity was therefore filed by a judgment creditor of the corporation, against Adams and the other stockholders of the corporation, to compel them to account for the assets of the corporation, which they had divided among themselves, and to hold them individually liable to the extent of the judgment obtained against the corporation. Our Court, speaking through Judge Somerville, expressly approved the above doctrine and sustained the equity of the bill filed by the creditor of the corporation, and affirmed a joint and several decree against all the stockholders.

As to the respective liability of the several stockholders, the Court says:

> "Strictly speaking, the liability of each stockholder would be limited to the value or the proceeds of the corporate property which he has received, and, as between the several shareholders, contribution should be made pro rata for the satisfaction of the corporate debt."

The Court further holds, however, that the creditor is entitled to a joint and several judgment against all the stockholders and, if this imposes any unequal burden on one or more of the stockholders, "any one or more of them may compel contribution pro rata in the usual way." In short, the creditor can compel all or any of the stockholders to make restitution for the wrongful division of corporate assets among themselves. If some of the stockholders are forced to pay more than their pro rata part, then this inequality may be remedied by appropriate proceedings between the stockholders themselves. This question concerns only the stockholders and must be settled *inter sese,* and without any prejudice to the rights of the creditor of the corporation.

As clearly shown by Judge Somerville in his opinion this principle of the preference of creditors over stockholders is applicable to all corporations, whether solvent or insolvent, and is wholly independent of the "trust fund" theory established by statute with respect to insolvent corporations. In the very nature of the thing, irrespective of the insolvency of the corporation, the capital stock and other assets of the corporation are primarily pledged to the payment of debts owing by the corporation. The corporate organization relieves the stockholders of individual liability for debts of the corporation, except as to any unpaid subscriptions for stock. So, that the capital stock and assets of the corporation are the only bases for the extension of credit to a corporation. If the *very basis* of credit can be appropriated by the stockholders for their individual benefit, without accountability to creditors of the corporation, then credit cannot safely be extended to any corporation.

While in the Adams case, supra, the bill against the stockholders was brought by a *judgment creditor* of the corporation, it does not follow that a simple contract creditor, without a lien, cannot avail himself of the same remedy. It may be the part of prudence to first obtain a *judgment* against the corporation itself for *all* franchise taxes due, and then file the bill as a *judgment* creditor of the corporation. But, the facts themselves present a case of original equity jurisdiction on the theory that the stockholders have appropriated property which is charged with a "trust." And trust property can always be followed and subjected in a court of equity. In Bank of St. Mary's v. St. John, 25 Ala. 566, (cited with approval in the Adams' case, supra,) it was held by our Supreme Court that a bill of this kind came within the original jurisdiction of the chancery court, and that a creditor may proceed in equity without a judgment at law.

The corporation continuing to exist as such, until legally dissolved, its liability for the franchise tax continues to exist. I am of the opinion that the stockholders cannot by a wrongful appropriation of all the assets of the corporation defeat debts of the corporation subsequently accruing. The same reasoning which subjects such stockholders to liability for the debts existing at the time of the abortive dissolu-

tion renders them liable for subsequent debts which necessarily arise by operation of law.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

COLLECTION OF TAXES:—Method of collecting from delinquent tax payer owning shares of stock in foreign corporation.

March 11, 1921,

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You state that there are several assessments against residents of Alabama on stock in foreign corporations owned by such residents of Alabama. These assessments were made under subdivision (1) of Section 5, Revenue Law of 1919 (Acts 1919, page 286), which subject to ad valorem taxation "shares of stock in companies or associations, not incorporated under the laws of this state."

The inquiry you make is: How shall the tax collector proceed to collect the taxes due on these assessments?

Section 6 of the Revenue Law provides that all taxes become due and payable on October the first and delinquent on the first day of January succeeding.

Section 200 of the Revenue Law requires the tax collector to make personal demand in writing upon all delinquent taxpayers after the first day of January.

Section 201 requires the delinquent taxpayer to pay all costs, fees and charges that may at the time of payment have lawfully accrued.

Section 202 imposes interest on all delinquent taxes at the rate of eight per cent per annum and requires this interest to be added to and collected as a part of the taxes.

Section 205 provides:

> "After the first day of January of each year, the tax collector must proceed, without delay, to levy upon any personal property of delinquent taxpayers for the payment of their taxes," etc.

Section 207 provides:

> "No property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes and the fees and charges lawfully incurred in assessing and collecting taxes against the owner thereof."

Sections 208 to 210, both inclusive, require the tax collector to institute in the name of the state garnishment proceedings against any person indebted to, or having in his possession or control, any money, property, or choses in action, belonging to delinquent taxpayers.

Section 212 provides that when no personal property can be found out of which the taxes of any delinquent taxpayer can be collected, or an amount insufficient to fully satisfy such taxes, the real estate of such taxpayer shall be sold for the payment of the taxes, or of the balance due thereon, in the manner prescribed by law. But the failure of the tax collector to exhaust the personal property shall not invalidate the sale of any real estate.

The provisions of Section 211 as to the levy and sale of shares of stock for the payment of the taxes assessed against the owner thereof necessarily apply particularly to domestic corporations. It is practically impossible to apply this section to foreign corporations, whose books are kept outside of the state and which have no office, officers or agents in Alabama.

The conclusions from the above quoted provisions of our Revenue Law are:

First: The tax collector should at once levy on any tangible personal property of the delinquent taxpayer in his county.

Second: If there is no tangible property of the taxpayer out of which collections can be made, the tax collector should institute the garnishment proceedings authorized by Section 208 et sequitur.

Third: If the above remedies are unavailing, the tax collector should proceed under section 212 to sell any real estate owned by the taxpayer.

Fourth: If none of the above remedies prove effective, and if the tax collector still thinks that a judgment against

the taxpayer will be collectible, (a very unlikely possibility), then suit can be instituted for the taxes due.

Yours very truly,

HENRY P. WHITE,
Assistant Attorney General.

HORSE RACING—Not forbidden by laws of Alabama.

March 11, 1921.

Mr. Ira Champion, Secretary,
Executive Department,
Capitol.

Dear Sir:

You request to be advised whether horse racing is permitted under the laws of Alabama.

There is no law prohibiting horse racing except upon public highways (Code Section 7728), or on Sunday (Code Section 7814).

However, Code Sections 7002 to 7005, inclusive, prohibit selling or buying pools or books on races, or betting money or any other thing of value upon the event of any horse race or other race, within or without the State. This constitutes a misdemeanor, and may be punished by fine and imprisonment.

Section 7000 also makes it a misdemeanor to aid another to enter into any transaction whereby he may win or lose upon any horse race or other contest, and provides punishment for the offense. This section was amended in 1919 (Acts 1919, p. 1112) so as to apply to races and other contests within as well as outside the State.

Yours very truly,

B. SUMMERS,
Assistant Attorney General.

TAXATION:—Collection of judgments for tax on capital stock of domestic corporations owned by non-residents, where corporations have no property within Alabama.

Hon. Jno. S. Mooring, March 11, 1921.
Chairman State Tax Commission,
Capitol.

Dear Sir:

Following the opinion rendered by this office on October 8, 1920, in re The Carolina Mineral Corporation, you have made several assessments against non-resident stockholders of domestic corporations on capital stock, which corporations have no property in Alabama and no officer resident in this State.

The opinion above referred to advised you fully as to the method of making assessment and also as to the method of collection.

As stated in this opinion, suit should be brought against the corporation in the manner prescribed by statute. Having obtained this judgment against the corporation in Alabama, and there being no property in Alabama to realize on, suit on this judgment should then be brought in the state where the corporation does own property, as suggested in our letter to you of November 9, 1920.

The tax against any resident stockholder of such a corporation can be collected as stated in our letter to you of March 10, 1921.

You can refer to this office those assessments which necessitate suits for their collection.

Very truly yours,
HENRY P. WHITE,
Assistant Attorney General.

DENTIST AT PENITENTIARY:—Agent of the State may do dental work without license.

Dr. S. T. McKinnon, President, March 14, 1921.
State Board of Dental Examiners,
Troy, Ala.

Dear Sir:

The Attorney General has referred to me your letter of the 5th inst., concerning the employment of Mr. John Pierce

by the Convict Department for the purpose of doing dental work for the State convicts.

You ask if the State of Alabama can legally employ an unlicensed dental surgeon as in this case.

"The States are sovereign within their separate spheres as to all powers not delegated to the United States or prohibited to the States." 36 Cyc. 828 "A." In other words the State can do *anything* provided it has not surrendered the power to the Federal Government and is not prohibited from so doing by the terms of the Federal Constitution. There is no provision in the Federal Constitution which prohibits a State from having a Convict Department, and the right to have such a department and to have convicts in it necessarily carries with it the right to make necessary provisions for such convicts and dental work is one of those necessary provisions.

To deny that the State has the power to do *its own* dental work, is to deny to it the power and authority to enact laws providing rules and regulations for doing such work in this State *by others.* If the State cannot do its own dental work in such way and by such means as it may desire, it has no power to declare under what conditions others may engage in such work, and if it does not have that power the whole of the Act to define dentistry, etc., amounts to a nullity and cannot be enforced. Certainly the State can do anything which it has the power and authority to regulate others in doing.

The State cannot license others to do dental work unless it can do such work itself. The State as an abstract sovereign cannot fill or extract a tooth or treat a patient, but can only act through an agent, and can do anything through its agents which it has the right to do itself. The State cannot be taxed and a license is a form of tax, and the State cannot be sued or prosecuted. Assume then that the State as an abstract sovereign does dental work, it cannot be required to pay a license for doing so, for to do so, would be to subject it to taxation; and it cannot be prosecuted, for taxing the State and prosecuting it are both prohibited by the Constitution adopted by the sovereign people of the State. The State can only act through its agents and when so doing the agent is not subject to a license or prosecution

for failing to have a license, being, as he is, the mere *alter ego* of the State.

If Mr. Pierce is subject to a license, every employee of the State who is engaged in work for the State, if such work when done as a private enterprise is subject to a license, would have to pay a license or the State would have to pay itself a license for each such employee. If Mr. Pierce is subject to a license, every convict who drives a car for the State; does any engineering work for the State on the State farms or otherwise; or does any accounting work in the penitentiary or otherwise for the State; or does any building for the State on its farms or at the penitentiary, or treats the horses and mules owned by the State and kept on its farms or elsewhere would be subject to a license. Not only would this be true of every convict but it would be true of every employee of the State. Such a course would revolutionize the law and practice in Alabama along this line.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

PUBLIC HIGHWAYS:—State or county has right of eminent domain for roads within corporate limits of town.

March 14, 1921.

Hon. W. S. Keller,
State Highway Engineer,
Bell Building,
Montgomery, Ala.

Dear Sir:

The Attorney General has referred to me your letter of the 8th inst., in which you request advice as to whether or not the execution of the right of eminent domain in securing rights of way for public roads by State or counties, such right extends into the corporate limits of a town or city.

You are referred in this connection to an Act of the Legislature passed at its 1915 Session (Acts 1915, p. 573).

Section 5 of said Act provides "that the board of revenue, courts of county commissioners or other like governing bodies, of the several counties of this State, are hereby given the right of eminent domain for the purpose of establishing

and changing of public roads, bridges and ferries in their respective counties."

Section 15½ of said Act provides that the court of county commissioners, or other like governing body of any county with the consent or the permission of the city council or governing body of any municipality, may establish, construct and maintain any road, street, or bridge within the corporate limits of such municipality.

Note also in this connection Section 14 of the Highway Commission Act (Acts 1919, p. 890) reading as follows:

> "The rights of way deemed necessary by the State Highway Department for a road constructed under the provisions of this Act shall be acquired by the county in which such road is located without expense to the State. Should the county fail or refuse to acquire the necessary right of way, the State through the State Highway Commission, shall have authority to acquire such rights of way either by purchase or by the exercise of the right of eminent domain."

From the foregoing statutes you will observe that the duty rests upon the county to acquire a right of way, but in the event of a refusal or failure of the county to acquire such right, the State has the authority to do so and that the county has the authority to act within corporate limits of a municipality with the consent or permission of the governing body of such municipality. I, therefore, suggest that before condemnation proceedings are instituted, the matter be taken up with the municipal authorities of the town of Banks, and their consent or permission secured.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Appropriation for salaries and expenses.

Hon. C. B. Rogers, Chairman, March 16, 1921.
Board of Control and Economy,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 25th ult., in which you make inquiry as to the proper

construction to be put upon the language found at the top of page 1119 of the General Acts of 1919, reading as follows:

> "There is hereby appropriated an amount sufficient to pay all salaries, wages and other expenses and outlays authorized to be paid or incurred in this and the said original Act of February 13, 1919."

Your attention is invited to an opinion rendered by Hon. Lawrence E. Brown, former Special Assistant Attorney General, to Hon. W. D. Nesbitt, your predecessor, under date of April 2, 1919, wherein it was held that while the original Act creating your department and providing for certain employees does not go further and make an additional express appropriation of funds to pay their salaries, this was immaterial, as the provision for the employment and their payment was *within itself* an appropriation. The position taken by him is, in my opinion, undoubtedly correct, and it was not necessary as to the employees authorized to say "there is hereby appropriated," etc. That would have been redundant, as the provision for the employment, by its own force and by its own terms, was an appropriation of a sum sufficient to pay the salaries.

State, etc. v. Smith, etc., 66 So. 61.

The Act creating the Board of Control and Economy was approved February 13, 1919. Under date of September 30, 1919, the Act "To confer additional powers, authority and jurisdiction on and to further prescribe the duties of the Board of Control and Economy" was approved.

It will be noted that this latter Act put the Convict Department and the State Prison Inspector under the jurisdiction of the Board of Control and Economy, and put upon said Board the additional duties of looking after the segregation and treatment of patients connected with the Convict Department, work in connection with public printing and binding, emergency purchases, looking after the State's property, and acting as purchasing agent for the various counties and the several departments of State. In other words, this latter Act placed upon the Board a great many additional duties which necessarily required a much greater clerical force and the incurring of considerably more ex-

pense than was contemplated under the original Act, which was taken care of in the general appropriation bill approved on the same date as the second Board of Control and Economy Act. This general appropriation bill was doubtless prepared and agreed upon before the passage of the second Board of Control Act.

In order to meet the new conditions brought about by the later Act, and possibly noting the fact that the usual language "there is hereby appropriated," etc., did not appear in the original Act, the general blanket provision quoted in your letter and repeated above was inserted in the supplemental Act in order that no question might arise as to "salaries, expense, and other outlays authorized to be paid or incurred in this and the said original Act of February 13, 1919."

True, something is said in the same paragraph about the Convict Department, but it is expressly provided as to the employees of that department that their salaries or compensations shall be paid out of funds of the Convict Department. This within itself is, however, sufficient to show that the language in the appropriation clause here under consideration, was meant to be a general provision for *"all"* expenses connected with the operation of the board.

The mere fact that the clause appears in a paragraph relating to the Convict Department is shown by the provisions of the Act itself to be without significance, for the reason that the Convict Department is dealt with in this Section 1, the *Prison Inspector* is dealt with in Section 2, and the Convict Department is *again* taken up in Section 3. The fact that the appropriation was not meant in any sense to be limited to the Convict Department but was meant to relate to all of the departments under the Board is made conclusive by the fact that the title to the Act *first* mentions the Convict Department, then mentions all other matters embraced by the Act except the appropriation and mentions it as the last item in the long title to the Act, the title dealing as it does with various matters. This conclusively shows that the Convict Department and the appropriation clause had no connection with each other in the mind of the author of the bill at the time he was drafting it and the intention of the Legislature is what governs. If in the

writer's mind the two subjects had been connected with each other, certainly he would have connected them in the title to the Act, when as a matter of fact they are as far removed from each other in the title as it is possible for them to be. The writer of the bill was at this juncture dealing with the subject of appropriating funds for the operation of the Convict Department which he had just put under the Board of Control and Economy, and used that as a convenient place to include the general appropriation for the Board of Control and Economy for which he had made provision in the title to the bill.

My conclusion is that the appropriation inures to the benefit of the Board in all of its operations and is not confined to the Convict Department for which no appropriation was needed, it being already amply provided for.

Yours truly,

LAMAR FIELD,
Assistant Attorney General.

MONEY LENDER'S LICENSE:—Due by non-resident principal and also by resident agent, for one or more acts of business. License as real estate agent does not cover money lending.

March 17, 1921.

Hon. J. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your letter of December 21, 1920, addressed to the Hon. J. Q. Smith, Attorney General, and your letter of February 21, 1921, addressed to the Hon. Harwell G. Davis, Attorney General, requesting an opinion upon the matters inquired about in these letters, have been referred to me. I beg to advise you as follows:

First: Where a foreign loan company performs the business of lending money in Alabama through any person, firm, or corporation here, such foreign loan company is liable for the privilege license under Schedule 70, Section 361, of the Revenue Act of 1919.

A single act constitutes the doing of business by such foreign loan company in Alabama so as to make it liable for such license tax.

Nelms v. E. A. L. M. Company, 92 Ala. 157.
Farrier v. N. E. Mortgage Securities Company, 88 Ala. 275.

The fact that such foreign loan company makes a loan in Alabama through a resident of Alabama under a contract between the foreign loan company and such resident of Alabama under which contract such resident is made the agent of the borrower does not exempt such company from payment of such license tax.

A loan of money by a foreign corporation to a citizen of Alabama is not a matter of Interstate Commerce and hence such business shall not be exempt from payment of such license tax under the Interstate Commerce clause of the Federal Constitution.

Nelms case, supra, 92 Ala. 157.
Padgett v. Gulf Port Fertilizer Company, 11 Ala. App. 360.
Standard Home Company v. Davis, 217 Fed. 915.

Second: If the Alabama resident who negotiates a loan for such foreign loan company is also in the real estate business and engages in the business of loaning money as an incident merely to such real estate business, he will also be liable for the additional license required under Schedule 101, Section 361, of the Revenue Act of 1919. It is plain that this additional license of fifty dollars ($50.00) was intended to be and is a license tax for carrying on such business as an agent and is, therefore, to be distinguished from the business of the principal who is making such loans. The fact that such resident agent is made liable for a license tax for carrying on the business of buying, selling, and renting real estate on commission does not exempt him from this additional license of fifty dollars.

A license to pursue a given occupation does not confer the right to pursue another distinctly different one.

25 Cyc. 624.

The license taxes imposed by the above named Schedule 70 and the above named Schedule 101 are not violative of the Constitution.

Phoenix Carpet Company v. State, 118 Ala. 143.

Yours very truly,

HUGH WHITE,

Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Use of revolving fund to lend money to State institution to pay insurance on buildings.

March 18, 1921.

Hon. C. B. Rogers, Chairman,
Board of Control and Economy,
Capitol.

Dear Sir:

Your letter of February 15 has been received. In this letter you ask if the Board can legally loan Dr. F. H. Manning from the revolving fund money to pay insurance on the buildings at the Deaf, Dumb and Blind School at Talladega. Your request for an opinion on this matter has been referred to me and I beg to advise you as follows:

The revolving fund referred to is provided under Section 5 of the Act approved September 30, 1919. The purposes for which such revolving fund was created and to which the funds provided may be appropriated are set forth in this Section 5. The section states that such fund is provided to enable the Board "To make emergency purchases and purchases in quantities, or by wholesale, of supplies and equipment * * * in order to enable it to obtain special bargain or low prices or reduced prices incident to quantity purchases, as well as to enable it to have on hand supplies in quantities of commodities of common use for any of the several institutions and departments served by it."

It appears that the purposes for which this revolving fund are furnished may be grouped into two classes:

First: Emergency purchases.

Second: Purchases in quantities or by wholesale of supplies and equipment where by making purchase in quantities or by wholesale the Board is enabled to obtain special

bargain or low prices or reduced prices incident to quantity purchasing.

It does not appear from your present inquiry that a situation exists with respect to the purchase of insurance for the buildings at the Deaf, Dumb and Blind School which puts this case in the second class of purchases as above classified. The further question might arise as to whether insurance would be included within the term "supplies and equipment." Clearly I think it would not come within the term "equipment." Neither would it come within the narrow or restricted use of the word "supplies."

As applied to material objects a supply is understood in its restricted sense to mean any substance that is consumed with its use. As used in its more general signification a supply is anything required or furnished to meet a need.

> Grant Pass Bank & Trust Company v. Enterprise Mining Company, 34 L. R. A. (New Series) 396. 37 Cyc. 607.

When the general nature and the general purposes of the Acts of the Legislature of February 13, 1919, and September 30, 1919, are considered, and the general authority vested in the Board of Control and Economy in this behalf is taken into consideration, I am of the opinion that the word "supplies," as here used, is to be considered as meaning anything required to meet a need within the scope or purview of the various institutions for which the Board is required to furnish supplies.

Whether the Board can make this loan in the present instance must, therefore, be determined by considering whether it falls within the first class of purposes, namely; emergency purchases, for which this revolving fund has been furnished.

The word "emergency" is defined as meaning any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition.

> 15 Cyc. 542.

The older use of the word shows that it was applied to an event or condition which was unexpected or that could not

reasonably have been foreseen. The meaning of the term, however, by usage has been enlarged so as to make it apply to any situation of pressing necessity which calls for immediate action or remedy. As used in Section 5, above referred to, I am of the opinion that the word is used to apply not only to a situation or condition which was unexpected or unforeseen, but also in its widest sense as applied to any situation which calls for immediate action or remedy. I am inclined to this view because of the general authority vested in the Board by these Acts of the Legislature and the wide scope of its powers with respect to purchasing for the institutions with which the Board is charged under the Acts named.

In making any expenditure out of this revolving fund provided under Section 5, Acts of 1919, page 1120, careful consideration must always be given to the requirement of said Section 5 that any amount so expended must be paid back to this fund out of the funds of the particular institution or department for which expenditure has been made.

If in the present instance an emergency exists, as above defined, with respect to the necessity for insurance on the buildings of the Deaf, Dumb and Blind School at Talladega, Ala., and an appropriation for such school has been provided that will enable it to reimburse the revolving fund for the amount proposed to be advanced to the school, then it is my opinion that the Board is authorized to purchase such insurance as an emergency purchase.

Whether you make the loan to Dr. Manning for this purpose can be determined by you from what is above stated.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

STATE PRISON INSPECTOR:—May reasonably require keeping and furnishing of daily ration sheets by sheriffs.

Dr. Glenn Andrews, March 21, 1921.
State Prison Inspector,
Montgomery, Ala.

Dear Sir:

Your letter dated today states that the State Prison Inspector has promulgated a regulation "requiring sheriffs to

keep on file in their office a copy of the daily ration sheet showing all foods served to the prisoners in the jail for that day, together with the number of people fed," and that a copy of this ration sheet be sent to the State Prison Inspector with the monthly jail report. You wish to be advised if the State Prison Inspector has the authority to require the keeping of such records and the making of such report.

Section 23 of the Act approved April 8, 1911, provides so far as applies to this question, as follows:

That it shall be the duty of the sheriff of each county in this State to mail to the inspector at Montgomery, not later than the tenth of each month, a full and complete statement for the previous month, of the number of prisoners in jail, deesignating them by race and sex, stating their physical condition as to health, and number of times and dates visited the jail or prison by the county health officer, and *such other detailed information as may be required by the inspector.* For this purpose necessary blanks will be furnished by the inspector.

Acts 1911, page 356.

The immediately preceding section of this Act refers to the quantity, variety, quality, and nutritiousness of foods furnished for the prisoners by jailers. The entire context of this Act clearly indicates the purpose to charge the State Prison Inspector with supervision of feeding prisoners. The intent of the legislation would be to a large extent defeated if this were not true. It necessarily follows that the report of the daily ration is "such other detailed information as may be required by the inspector."

Furthermore, Section 6 of the Act approved September 30, 1920, provides:

"It shall be the duty of the State Prison Inspector, and he hereby is given the power and authority, to supervise, either in person, or by deputy, the feeding of all prisoners in the jails of this State, and make and promulgate such rules and regulations, not inconsistent with law, for feeding, preparation and character of the food of all such prisoners."

Acts Special Session 1920, page 28.

The power under this Act to promulgate such a regulation is, in my opinion, plain and unequivocal.

It is my opinion that the State Prison Inspector had full authority to promulgate the regulation requiring the daily ration sheet and the reports relative thereto. The failure to comply with this regulation would perhaps be "wilful neglect of duty."

Constitution of Alabama 1901, Section 173.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COUNTY QUARANTINE OFFICER:—Position may be held by sheriff of county.

Dr. S. W. Welch, March 23, 1921.
State Health Officer,
Capitol.

Dear Sir:

I have for reply your letter to the Attorney General of February 24, enclosing letter to you from Mr. J. H. Strength, sheriff of Elmore county.

You ask whether the sheriff can hold the position of quarantine officer of the county, and receive therefor a compensation of twenty-five dollars ($25.00) per month, under the provisions of Section 710 of the Code of Alabama, as amended by Acts 1919, page 916.

The payment of this twenty-five dollars ($25.00) per month does not constitute an increase in the compensation of the sheriff, in violation of Section 281 of the Constitution, because the duties of the quarantine officer are in no way connected with the office of sheriff.

Nor is Section 280 of the Constitution applicable, as a quarantine officer is an employee of the State Committee of Public Health, removable at any time by that Committee,and is under the control and supervision of the State Health Officer and the County Health Officer. In the case of State v. Sanders, 197 Ala. 79, it was held that the State Health Officer himself was not an officer of the State within the meaning of Section 281, but merely an employee of the State Board of Health.

Very truly yours,
BERNICE SUMMERS,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—Pay for clerical assistance is only compensation allowed for preparing lists of electors.

March 24, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The Hon. Watkins M. Vaughan, Probate Judge, of Dallas County, in his letter directed to you, requests to be advised whether Section 36 of the Act approved October 2, 1920, providing for clerical assistance in preparing lists of qualified voters for the election inspectors, makes an additional allowance to the amount allowed to the probate judge for the performance of such duty.

Acts Special Session 1920, page 133.

Section 42 of the Act is as follows: "That an Act 'To provide for the registration of electors enacted by the Legislature at its session held in 1915,' and an Act 'To amend an Act providing for the registration of electors' approved September 29, 1919', be and the same are hereby expressly repealed."

This repealing clause leaves this Act the sole statute on the subject of registration of qualified electors, preparing lists of voters for election inspectors, and the compensation for such work. The Legislature failed to provide in this Act any compensation for the probate judge for preparing and furnishing lists of qualified voters to the election inspectors. The only allowance for preparing such lists is that contained in Section 36 of the Act permitting the payment of clerical help necessary to completing and properly preparing such lists.

It follows that the compensation allowed in Section 36 of this Act is not in addition to the amount heretofore allowed the probate judge for the performance of such duty, but is the only compensation provided by law for the performance of such duty.

Yours very truly,

HARWELL G. DAVIS,
Attorney General.

ELECTIONS:—Expenses of all primary elections defrayed in manner provided for general elections.

March 24, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts.
Capitol.

Dear Sir:

Replying to the inquiry of the Hon. Watkins M. Vaughan, probate judge of Dallas County, relative to the payment of expense of the primary which will be held in the Fourth Congressional District on the 4th day of April, 1921, I beg to advise as follows:

An Act approved September 22, 1915 (Acts 1915, p. 722) provides that, "All expenses and charges for holding primary elections in this State shall be paid in like manner as fees and charges for holding general elections." It will be noted that this provision includes all primaries, regardless of whether there is a general primary, the time for holding of which is provided by law, or a special primary called by the governing authorities of a political party.

It is necessary to give this Act this construction for it to be given a field of operation, because previous to its enactment and approval there was a statute providing for the payment of expenses of general primaries (Acts 1915, p. 219, Section 8). Furthermore, the Act approved September 22, 1915, prevents the governing body of a political party from assessing any fee on candidates in the primary and makes it a misdemeanor to assess such fee as a condition precedent to standing for nomination to any office in such primary elections.

This section virtually destroyed the only means by which a political party could secure funds to defray the expense of primaries. This is virtually conclusive that the Legislature intended the expenses of all primaries to be defrayed in the same manner as provided for the payment of the expenses of general election.

It is my opinion, therefore, that this part of Section 34 of the Acts 1915, p. 230, providing that the State should not defray the expenses of a primary called by the governing authorities of a political party was repealed by the Act approved September 22, 1915, supra, and that the ex-

penses of such election are required by law to be paid as are the expenses of general election in this State.

Certain sections of the primary law are amended by the Legislature of 1919, but this amendment did not contain, in my opinion, any valid clause repealing that part of the Act approved September 22, 1915, which requires the expenses of all primaries to be paid as are the expenses of a general election.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

CONSTRUCTION OF STATUTES:—Where terms of act vary from title, act is unconstitutional.

March 25, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of the 23rd instant encloses the following inquiry from the Hon. C. C. Brooks, Assistant Examiner of Accounts, to-wit:

> "Is the present tax assessor of Conecuh County, who was elected and assumed office prior to the passage and approval of the Act 'to authorize the commissioners court of Conecuh County, Alabama, to pay out of the general fund of said county to the tax assessor of said county the sum of six hundred dollars per annum for extra assistance in his office' approved September 25, 1919, Local Acts 1919, page 211, entitled to receive the benefit of this Act during his present term?"

Section 45 of the Constitution of 1901, so far as applicable to the matter under consideration, provides as follows:

"Each law shall contain but one subject which shall be clearly expressed in its title."

Our Supreme Court has held that the intention of this constitutional provision is to advise the members of the Legislature of the subject of the legislation contained in the

proposed Act and prevent securing support of legislators for measures which contain provisions in the Act not indicated by the title. This constitutional section has always received a liberal construction, to prevent crippling proper legislation, and a title is not objectionable because general, but the title must not be misleading or be more restricted than the provisions of the Act.

Ballantyne v. Wickersham, 78 Ala. 533.
Louisville & Nashville R. R. Co. v. Grant, 153 Ala. 112; 45 So. 226.
Patton v. State, 160 Ala. 11; 49 So. 809.

The title of the Act under consideration is "to *authorize* the commissioners court of Conecuh County" to pay the tax assessor a sum of money for extra assistance in his office. The provision of the Act is "that the commissioners court of Conecuh County be and hereby is *required* to pay" to the tax assessor a certain sum for assistance in his office. In my opinion this title is misleading and did not indicate the real subject contained in the Act.

The word "authorized" conveyed the idea that the court of county commissioners was vested with the discretionary power of determining whether or not such pay should be allowed the tax assessor for assistance in his office, while the word "required" does not give the court of commissioners any discretion in determining whether or not such extra compensation should be allowed, but compels the court of county commissioners to make such payment, regardless of whether the court considers such action advisable or not. Our Supreme Court has recently had occasion to note that the word "authorize" is not the equivalent of the word "require."

National Surety Co. v. City of Huntsville, 192 Ala. 82; 68 South. 373.

To require or compel a thing to be done is entirely different from permitting or authorizing it to be done. It is reasonable to suppose that many legislators would have been willing to have empowered the commissioner's court, if they deemed it proper to be done, to make such allowance to the tax assessor, as the commisisoner's court would be

familiar with the financial condition of the county, and also the need of the tax assessor for extra assistance in his office, yet would not have been willing to arbitrarily compel, by an Act of the Legislature, the payment to the tax assessor of such allowance.

It is my opinion, therefore, that the title of this Act is misleading, and that the Act is unconstitutional and void. It follows that no one can claim any right or benefit by reason of its terms.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

BONDING COMPANIES:—Corporations executing official bonds must comply with all laws as to insurance companies and as to domestic or foreign corporations.

March 26, 1921.

Hon. A. W. Briscoe,
Insurance Commissioner,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of February 1, 1921, to Hon. J. Q. Smith, former Attorney General, wherein you request advice as to whether or not individuals, firms, and corporations engaging in the business of executing fidelity and official bonds in Alabama without having complied with the insurance laws of the State, are in violation of any of the provisions of any of the Alabama statutes.

Your attention is invited to the provision of Sections 1507 and 1523 of the Code of 1907 as amended by an Act "To amend Sections 1508, 1509, 1510, 1513, 1517, 1520, 1522, 1523 and 7006 of the Code of Alabama of 1907," etc. —Acts 1909, page 323; Insurance Department pamphlet, page 48 et seq. The provisions of this Act are confined to *corporations* executing *official* bonds as surety. See Sections 1508, 1509 and 1523 of the Code as amended by said Act of 1909. It will also be noted that these sections of the Code come from the article entitled "Bonds by Guarantee Companies" and are found in the chapter entitled

"Offices and Officers," which shows that it was the intention to limit the provisions of said sections of the Code to official bonds.

Section 7006 of the Code, as amended by said Act of 1909 provides the penalty for doing such business without authority from the Insurance Commissioner.

An Act "To fix the amount of capital of and deposit with the State Treasurer by miscellaneous insurance companies excepting mutual aid companies"—Acts 1909, p. 29—Section 3 of said Act as amended by Act of 1915, page 132, contains certain regulations applicable to all insurance companies executing both official and surety bonds, while the article of the Code relating to "Offices and Officers," as amended by the 1909 Act, supra, contains additional provisions relating to companies executing official bonds.

There appears to be no statute regulating the execution of surety bonds by individuals or partnerships which have any bearing upon your Department. As to corporations, however, they must comply with the above mentioned statutes relating to insurance companies, and must also comply with all general laws relating to bonds and domestic or foreign corporations, as the case may be.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

INTEREST-BEARING WARRANTS:—Interest not paid on county warrants unless for valuable consideration and evidenced by records of commissioners' court. General fund not subject to payment of road warrants but may be transferred to road fund in case of surplus.

Hon. Chas. E. McCall, March 28, 1921.
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of the 23d instant, enclosing letter of Hon. P. B. Jarman, Jr., requesting opinion of this office on certain matters has been received and I beg to advise as follows:

1. The Court of County Commissioners or like governing body is not vested with the power to indiscriminately issue

interest-bearing warrants for all obligations of the county. The authority to issue interest-bearing warrants is limited to those matters relative to which the Commissioners Court is empowered to contract, and the agreement to pay interest must be supported by a valuable consideration. There is, therefore, no authority to issue an interest-bearing warrant for the financial obligations of the county where the obligation was not created by the contract of the Court of County Commissioners or where the agreement to pay interest is not based on a valuable consideration.

Board of Revenue, Shelby Co., v. Farson Son & Co., 197 Ala. 375; 72 South 611.
Stone Co., Treas. v. Jett-Muths Constr. Co., 85 South. 443.
Talley v. Commrs. Court, 175 Ala. 644; 39 South 167.
Littlejohn v. Littlejohn, 195 Ala. 614; 71 South 448.
O'Rear v. Sartain, 193 Ala. 275; 69 South 554.
Town of Eutaw v. Coleman, 189 Ala. 165; 66 South. 646.
Matkin et als. v. Marengo Co., 137 Ala. 155; 34 South. 171.
Ala. City, G. & A. R. R. Co. v. City of Gadsden, 185 Ala. 263; 64 South. 91.
Covington Co. v. Merrill, 193 Ala. 538; 69 South. 971.

2. Ordinarily a county warrant is a promise to pay when the county is in funds, and a county is not liable for interest on its warrant because of a failure to pay promptly. When this character of warrant has been properly issued to a person, whether issued pursuant to a statutory provision fixing the amount of county liabilities, or whether issued pursuant to the terms of a valid agreement made by the Commissioners' Court, which failed to stipulate that such warrants should bear interest, there is no obligation on the county to pay until it is in funds, and the county is not liable for any interest because of delay in the payment thereof. There would be no consideration in such cases to support an agreement by the Commissioners' Court to pay interest on such warrants.

Littlejohn v. Littlejohn, supra.
Vincent v. Gilmer's Executor, 51 Ala. 387.

3. The Court of County Commissioners is a court of record. The exclusive source of evidence of its action is the written record and the acts of the court cannot be proven by oral testimony. It, therefore, follows that unless the record of the Court specificially shows a valid agreement on the part of the county to pay interest, there is no evidence of the authority to issue an interest-bearing warrant.

Vincent v. Gilmer's Executor, 51 Ala. 387.
Code 1907, Sections 3306 to 3314.
Mobile Co. v. Maddox, 195 Ala. 336; 70 So. 259.
Franklin Co. v. Richardson, supra.
Crenshaw Co. v. Sikes, 113 Ala. 626; 21 So. 125.
Speed v. Cooke, 57 Ala. 209.

4. Section 4 of what is known as the Goode Act (Acts 1915, p. 573), provides that the Board of Revenue or like governing body of any county, may transfer to the road fund of a county any surplus of general funds in the county treasury whenever, in the judgment of such court, it will promote the interest of the county to make such transfer. From the reading of this section, it will be noted that no part of the general fund is subject to the payment of warrants issued for road purposes. It will be further noted that no part of the general fund can be transferred to the road fund until there is a surplus in the general fund. It must affirmatively appear of record that there is a surplus in the general fund before this transfer can be made.

Mims, Treasurer, v. Stallworth, 180 Ala. 511; 61 So. 811.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

CITY BOARD OF EDUCATION:—May issue warrants to teachers even though limit of authority to borrow money has been reached.

Hon. Jno. W. Abercrombie, March 28, 1921.
Superintendent of Education,
Capitol.

My Dear Sir:

Your request for the opinion of the Attorney General upon the matters set out in the letters of Messrs. Lange &

Simpson, City Attorneys of Fairfield, Alabama, of dates March 16th and March 25th, has been received. Your request has been referred to me by the Attorney General and I beg to advise you as follows:

As I understand your inquiry it is this:

On account of delay in making tax collections in Fairfield and in Jefferson County, the City Board of Education of Fairfield is without available funds to make payment of the salaries of teachers of the city schools and other current expenses. It also appears from your inquiry that the City Board of Education has already borrowed money up to the limit of its authority to borrow money to meet the salaries of teachers and other current expenses as provided for and limited by Section 19 of Article 8 of the School Laws of 1919, page 599 of the Acts of Alabama of 1919. Your inquiry also involves the question as to whether the city board of education is authorized to incur indebtedness for teachers' salaries and other current expenses of the city schools in excess of the limit set to the amount which the city board of education may borrow under said Section 19 and whether the city board of education is authorized and empowered to issue warrants as evidence of such indebtedness to be thus incurred for teachers' salaries and other current expenses in excess of the amount prescribed by said Section 19.

Under said Article 8 of the Act of 1919 as set out on pages 595-600 of the Acts of Alabama of 1919, the general administration and supervision of the public schools and educational interest of each city in Alabama is vested in the city board of education. Such board is vested with all the powers necessary and proper for the administration and management of the free public schools within such cities, subject to the provisions of said Act. Such board is given power, subject to the provisions of said Act, to maintain a system of public schools. It is made the duty of such board to fix the salaries of all employees, which includes the principals, teachers, supervisors, attendance officers, and other regular employees. Such board is authorized, empowered and directed to maintain and operate uniform, equal and efficient schools.

See especially Sections 2, 6, 10, 12 and 18 of said Article 8.

It is plain that it was the intention of the Legislature

to give the city board of education power and authority to contract to such extent as is necessary to carry out the powers vested in the board and to perform the duties which are enjoined upon it by this Act. We know as a matter of common knowledge, that such board contracts at or before the beginning of each school year to pay the salary of all its regular employees, including its principals and teachers. It would emasculate the statute to hold that the board was without power to incur debt by entering into the contracts necessary for all these purposes. If this be true, then the question asked by you is whether the limit set by the said Section 19 upon the power and authority of the board to borrow money is a limit upon its power and authority to incur debt in performing the duties which are given to such board by this statute. It is my opinion that such limit upon the power and authority of the board to borrow money, fixed by Section 19, is not a limit upon its power and authority to incur indebtedness.

Under the statute above referred to creating such city board of education, the board is a quasi corporation, and its powers and authorities are to be determined by referring to the construction which our courts and those of other states have given to the power and authority of municipal corporations.

Since here such city board of education is created directly by Act of the Legislature and given its powers and authority directly by the Legislature instead of being created by the municipal corporation itself, as a department of the city government, I am of the opinion that the powers and authority given to such board should be construed more liberally than if it were a mere creature of the municipal corporation of Fairfield itself.

28 Cyc. 481.

Under Section 9 of said Act, p. 597 of the Acts of Alabama of 1919, the board is given full and exclusive rights within the revenue appropriated for such purposes and accruing with the use of the public schools to purchase real estate, fuel and supplies for the use of the schools, and to make necessary and proper notes, contracts, and agreements, in relation to such matters. The matters set out in said Section 9 as to which the board is given power ex-

pressly to make notes, contracts and agreements, certainly cannot be said to be of more vital necessity to the conduct of the schools than the employment and maintenance of an adequate corps of teachers. Certainly the authority to employ such a corps of teachers must necessarily belong to such board. It has been expressly held that a limit upon the authority of a municipal corporation to borrow money is not a limit upon its power to incur indebtedness.

Barrett v. E. St. Louis, 89 Ill. 175.
Richmond v. McGirr, 78 Ind. 192.
Gelpcke v. City of Dubuque, 1 Wallace 221.
28 Cyc. 1542.

While these decisions are based upon this question as applied in the case of municipal corporations, I am of the opinion that the principle applies to a construction of the statute which creates the City Board of Education of Fairfield and vests it with power and authority as given under said Act of 1919.

There is nothing in this Act which puts a limit upon the power of the board to incur indebtedness within the revenue appropriated for its purpose or securing to its use.

It is my opinion, therefore, that the city board of education is authorized and empowered to incur indebtedness for teachers' salaries and current expenses beyond the limit set by said Section 19 of this Act so long as such board keeps within the revenue appropriated for its purposes and accruing to its use.

If the board has the power to incur such indebtedness, then from the very nature of the case it would have the right to execute evidence of that indebtedenss and obligation to pay the same.

Richmond v. McGirr, supra, and other authorities there cited.

Warrants or other proper evidences of indebtedness may legally be issued to the persons with whom such debts are contracted.

Allen v. Intendant and Councilmen of LaFayette, 89 Ala. 631.

For reasons above stated, it is my opinion that payment of warrants issued for the purpose above named could not be enjoined or prevented.

Allen v. Intendant, etc., of LaFayette and other authorities above cited.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

OFFICE HOLDERS:—Local act relieving tax collector of payment of premium on official bond is unconstitutional.

March 29, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 26th instant, relative to premium on bond of the Tax Collector of Conecuh County.

An Act "To authorize the court of county commissioners of the County of Conecuh in the State of Alabama, to appropriate out of the funds in the treasury of said county an amount not exceeding $100.00 per annum," etc., to cover premium on the official bond of the Tax Collector when such bond is made by a duly qualified guarantee company (Local Acts 1919, p. 119), is referred to in letter of Mr. C. C. Brooks to you under date of March 24, 1921.

Mr. Brooks asks if the present tax collector, who assumed office for a four-year term on October 1, 1917, is entitled to receive the benefit of the Act referred to, and in your letter you ask if this would be in the nature of an allowance as is mentioned in Sections 68, 96 or 104, sub div. 24, of the Constitution.

Section 68 of the Constitution provides that "The Legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee or allowance to any public officer, servant or employee, agent or contractor, after service shall

have been rendered or contract made, nor to increase or decrease the fees and compensation of such officers during their terms of office," etc., with certain exceptions not here involved.

Section 96 of the Constitution provides that "The Legislature shall not enact any law not applicable to all the counties in the State, regulating costs and charges of courts, or fees, commissions or allowances of public officers."

Section 104, subdivision 24, of the Constitution provides that "The Legislature shall not pass a special, private or local law in any of the following cases * * *

> "(24) creating, increasing or decreasing fees, percentages or allowances of public officers."

Section 281 of the Constitution provides that 'the salary, fees or compensation of any officer holding any civil office of profit under this State, or any county or municipality thereof, shall not be increased or diminished during the term for which he shall have been elected or appointed."

In State ex rel. Thomas v. Gunter, 170 Ala. 165, the Supreme Court held that section 68 of the Constitution applies to incumbents at the time of the passage of the Act and not to persons taking office after the enactment of particular legislation affecting the office.

In Macon County v. Abercrombie, Judge, 184 Ala. 283, the Supreme Court construed Section 68 of the Constitution so as to uphold a statute allowing payment to a then incumbent for ex-officio services on the ground that the compensation referred to in this Section 68 of the Constitution means fees of precise compensation which have been definitely fixed by law, while ex-officio services means those services which the law annexes to a particular office and requires the incumbent to perform without providing specific or precise compensation therefor.

Under the rule laid down in these cases, it seems to me to be too clear to require argument that the present incumbent of the office of Tax Collector, who was elected previously to the Act in question and was at the time of the passage of the Act and is now holding the office, cannot receive the benefits of this Act, for the reason that to do so would have the effect of an increase in his fees or com-

pensation during his term of office. This would not seem to be a direct increase in his fees and compensation as such, but undoubtedly would be an indirect increase in the volume of such fees or compensation, as an allowance of a certain sum is provided for the period covered by the premium which has the effect of increasing *pro tanto* every fee and the compensation for every service performed during that period and increasing the fees or compensation for such period as a whole. This allowence clearly does not come within the rule applying to ex-officio services as mentioned above.

Section 104, subdivision 24, also has the effect of denying to the present Tax Collector the right to receive this allowance, although the Act itself is not unconstitutional as offending against said section, the section having been construed in Miller, Treasurer, v. Griffith, 171 Ala. 337, 342, as being confined in its application to an incumbent in office at the time of the passage of an Act. The court in referring to this constitutional provision said, "That section refers only to changing the compensation during the term of the officer, and cannot be construed as prohibiting the Legislature from making such provisions for such matters as applicable to officers subsequently appointed." So far as the present incumbent is concerned, however, the statute here involved clearly and undoubtedly has the effect of "creating * * * or increasing fees, percentages or allowances" of the Tax Collector during his term of office and he cannot legally receive the benefits provided by the Act.

If the Tax Collector of Conecuh County were a salaried officer, or the Act in question had been of a general nature, so that it might apply to other counties in the State even though it might not apply to all counties in Alabama, the result would be different, but it is not a salaried office and is a local Act expressly limited in its application to the one county.

Brandon, Auditor, v. Askew, Solicitor, 172 Ala. 160.
McNeill, Supt., v. Sparkman, Treasurer, 184 Ala. 96.

For an allowance to be made to the present tax collector for premium on his official bond, when his fees or compensation were already fixed by law at a sum which did not

provide for such premium, would also violate Section 281 of the Constitution, supra.

Morgan County v. Fidelity & Deposit Co., 77 So. 233.

While the Act itself appears not to violate the provisions of Sections 68, 104, subdivision 24, or 281 of the Constitution, it seems to be entirely clear that the present tax collector cannot receive any benefit of the Act without being in direct violation of the sections of the Constitution mentioned.

While as stated, the Act as a legislative enactment does not offend against Sections 68, 104, subdivision 24, or 281 of the Constitution, it is by no means clear that the Act is not unconstitutional and void when considered in connection with the provisions of Section 96 of the Constitution, supra.

Section 96 of the Constitution provides that "the Legislature shall not enact any law not applicable to all the counties in the State regulating * * * fees, commissions or allowances of public officers." It cannot be denied that the Legislature in enacting the local Act here involved has enacted a "law not applicable to all the counties in the State." The only remaining question then is, does the Act regulate "fees, commissions or allowances of public officers."

It seems to me to be free from doubt that the Act does regulate indirectly the "fees, commissions or allowances" of the tax collector, who is a public officer. Before the Act was passed the tax collector received certain fees, commissions or allowances provided by law and was required by the provisions of Section 2161 of the Code to supply, free of expense to the county, a bond. Now that the provisions of the Act relieve him of that expense and place it upon the county, every fee, commission or allowance received by him, and the sum total of the same for the period covered by the premium, are increased, and of course they cannot be increased or otherwise affected without being "regulated" within the purview of Section 96 of the Constitution.

In Brandon, Auditor, v. Askew, Solicitor, 172 Ala. 160, Mr. Justice Sayre in disposing of the contention that an Act fixing the salary of the Circuit Solicitor for the 15th Judicial Circuit was not violative of Section 96 of the Constitution said:

> "We have no difficulty in reaching the conclusion that solicitors are not compensated by allowances, but by salaries only, and that the constitutional provisions here relied upon by the appellee have no bearing upon his case."

The logical deduction to be drawn from this ruling is that if a local law regulates "fees, commissions or allowances" and not salaries, as we think is done in the local law here involved, it cannot stand as a valid enactment.

In McFountain, Judge of Probate, v. State ex rel. Russell, Sheriff, 83 So. 53, the Court, in referring to a local act affecting Monroe County (Local Acts 1907, p. 36), which conferred additional jurisdiction upon the County Court and contained certain provisions as to fees of certain officers, said:

> "Local Acts 1907, page 36, was repealed by Section 6 of Acts 1915, page 864. Moreover if such were not the case, it would, in so far as the fees in question are concerned, be repugnant to Section 96 of the Constitution of 1901."

In view of what is said above, it is my opinion, first, that for the present tax collector to receive the benefits of the local act here involved, a direct violation of Sections 68, 104 subdivision 24, and 281 of the Constitution would result;second, that the Act is unconstitutional and void in that it is in direct violation of the provisions of Section 96 of the Constitution.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

TRAINING SCHOOL FOR GIRLS:—Appropriation for buildings under 1919 Act may be used on site selected under 1920 Act.

Hon. C. B. Rogers, Chairman, March 31, 1921.
Board of Control and Economy,
Capitol.

Dear Sir:

Your letter of 28th instant has been received. In the letter you request the Attorney General to advise whether

the Board of Control and Economy of Alabama is authorized to use the appropriation of $50,000, provided under the Act of the Legislature approved September 30, 1919, pages 805, 806, of the Acts of Alabama of 1919, for erecting buildings and improvements for the State Training School for Girls, in the erection of such buildings and improvements at a different location from that named in this Act, in view of the fact that under the provisions of the Act of the Legislature approved October 2, 1920, page 114, of the Acts of Alabama, special session 1920, the State Board of Control and Economy, with the approval of the Governor, is authorized to remove such school and relocate the same at such place as is best suited for the institution.

Your request has been referred to me by the Attorney General for such opinion, and I beg to advise as follows:

While it is true that the Act approved September 30, 1919, above referred to, describes the place where the appropriation of $50,000 was to be expended, it evidently was not the intention of the Legislature simply to provide for the improvement of property at a particular place. The controlling purpose of this Act was to provide the appropriation for the benefit of the institution itself.

The subsequent Act approved October 2, 1920, was passed by the same Legislature in a special session thereof. The subsequent Act authorizes the removal and relocation of this school. When the authority given under the subsequent Act is exercised, and the school is removed to another site, then to hold that the appropriation provided under the Act approved September 30, 1919, could not be used at such new site because a description of the former site was set out in the first Act, would be to hold that the subsequent Act repealed or nullified the previous Act approved September 30, 1919.

The two Acts are in pari materia, that is, they deal with the same subject matter, and hence should be considered together in the construction of the statutes. Both should be given effect, if practical and consistent with sound construction or good reason. The statute last enacted does not in terms repeal the first. They are not so repugnant, or in conflict with each other that both cannot be given a reasonable construction and both upheld. Repeal by implication is not favored by our courts.

City of Birmingham v. Southern Express Co., 164 Ala. 529.

It is my opinion, therefore, that the appropriation of $50,000 above named can properly be used for the purposes set forth in the Act approved September 30, 1919, at such new location for this school as may be selected by the Board of Control and Economy as provided under the latter Act approved October 2, 1920.

Very truly yours,
HUGH WHITE,
Assistant Attorney General.

TAXATION:—Real estate not assessed to remaindermen; but entire value assessed to life tenant.

March 31, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A taxpayer in Hale County owns a life interest in a valuable farm. The life tenant, being an old person, her expectancy of any future enjoyment of this property is limited in the nature of the case to the necessarily few remaining years of her life. Her life estate, therefore, in the property assessed is not worth near so much as the interest in the same property which reverts in fee simple to the remaindermen on her death. Acting on the undoubted equity of the situation thus presented, a double assessment of this real estate was made; one against the life tenant, based on the value of her life interest, the other against the remaindermen, based on the value of their expectant interest.

The facts stated involve two inquiries:

First: Whether two assessments of the same property can be made—one against the life tenant and the other against the remaindermen, according to the respective values of each estate:

Second: If such an assessment is proper, can the interest of the remaindermen be sold at a tax sale, so as to divest their title to the property in question?

Section 2082, Code 1907, in enumerating the subjects of taxation, provides in part:

> "There is hereby levied for the purposes named, upon the property hereinafter named, in lieu of all taxes heretofore levied, annual taxes, etc.
>
> "1. Every piece, parcel, tract, or lot of land in this State, including therein all things pertaining to such land, and all structures or other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, timber, or other interest, when such interest is owned by a person other than the owner of the surface or soil."

The above section, as amended by the Revenue Law of 1919, Acts 1919, pages 284 and 285, Section 5, now reads:

> "Every piece, parcel, tract or lot of land in this State, including therein all things pertaining to such land, and all structures and other things so annexed or attached thereto as to pass to a vendee by conveyance of such land; and every separate or special interest in any land, such as mineral, *the right to mine minerals,* timber, *and the right to turpentine,* or other interests when such interests are owned by persons other than the owner of the surface or soil, *except growing crops.*"

The italicized portions indicate the change and addition made to the original Code section.

Without attempting to explain the purpose of each of the above noted changes in the Code section, we think the main legislative object in mind was to obviate the rulings of our Supreme Court in Ashe-Carson Co. v. State, 138 Ala. 108, and in State v. Roden Coal Co., 197 Ala. 407.

In the first named case, our court held that the right, under contract of lease, to take crude turpentine from standing trees was not a special possessory interest in the land itself, subject to taxation against the lessee under the above Code section. In the Roden Coal Company case, supra, our court, following the first named case, held that the right to mine minerals, under a lease contract, was not subject to taxation against the lessee under this Code section. With-

out expressing any opinion as to the object or effect of other changes made, we are satisfied that the primary purpose of the Legislature was to subject to taxation, against the owner thereof, the *right to mine minerals* and the *right to take turpentine* from standing trees.

The changes made by the Revenue Law of 1919 do not, therefore, in our opinion, affect the liability of a life tenant or remainderman for taxes assessed against their property. The amended law increases the *number* of special interests in real estate subject to taxation. It does not subject any *one interest* to *two* assessments because of *two existing titles* to this same interest.

Chief Justice Brickell, in Pruitt v. Holley, 73 Ala. 369, lays down this rule:

> "It is the duty of a tenant for life to keep down ordinary charges for taxes. He cannot suffer them to become delinquent, the estate sold for their payment, and become its purchaser, divesting the estate in reversion or remainder."

The same principle is announced in the recent case of Gunter v. Townsend, 202 Ala. 160.

26 R. C. L., p. 358:

> "A tenant under a perpetual lease, or under a lease for 99 years or more, subject to payment of a ground rent, may be considered the owner for purposes of taxation, and a life tenant should undoubtedly be treated as the owner of property for purposes of taxation rather than those holding the interest in remainder."

In Pink v. Wassell, 94 U. S. 714-715, Chief Justice Waite says:

> "There can be no doubt but the defendants, as tenants for life, are bound in law to pay the taxes upon the property during the continuance of their estate."

See also:

Cairus v. Chabert, 3 Edw. Ch. (N. Y.) 312.
Vaney v. Stevens, 22 Maine 334.
Johns v. Johns, 93 Ala. 239.

Wilson v. Linder (Idaho, 1912), 30 Am. & Eng. Ann. Cas., p. 148.
Jinkiaway vs. Ford (Kans. 1915), Ann. Cas. 1916 D, p. 321.

Section 2296 of the Code of 1907, which provides that no sale of land for taxes shall "convey the right, title, or interest of any revisioner or remainderman therein" is, in our opinion, simply declaratory of the already existing law. If our revenue law had provided specifically for the *assessment* of a *remainderman's* interest, then this section of the Code could properly be construed as meaning that a remainderman's interest could not be sold under an assessment made only against the *life tenant;* and that the provision above quoted would not apply where the assessment was *actually made* against the remainderman.

I am unable, however, to find any provision in our revenue law authorizing an assessment against a remainderman. In the absence of *authority for the assessment,* no tax can legally be collected.

I conclude, therefore, that the *entire value* of the real estate should have been assessed against the life tenant. The attempted assessment against the remainderman is abortive and amounts to nothing.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

FLORIDA-ALABAMA BOUNDARY LINE.—Bridges across Perdido River and Perdido Bay assessed for taxation in Alabama to middle of stream.

April 1, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

A resident of Baldwin County, Alabama, owns two bridges connecting Florida and Alabama—one across Perdido River and the other across Perdido Bay. For several years past

both bridges have been assessed and the taxes thereon paid in Florida, Alabama not receiving any part of the taxes paid.

Your inquiry is whether parts of these bridges should be assessed in Alabama.

The answer to this inquiry depends on the boundary line between Alabama and Florida at these particular points.

The Act establishing the Alabama Territory (Political Code, 1907, p. 31) defines the boundaries of Alabama as follows:

> "That all that part of the Mississippi territory which lies within the following boundaries: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido river, thence east to the western boundary line of the State of Georgia, thence along said line to the southern boundary of the State of Tennessee, thence west along said boundary line to the Tennessee river thence up the same to the mouth of Bear Creek, thence by a direct line to the northwest corner of Washington County, thence due south to the Gulf of Mexico, thence eastwardly, including all the islands within six leagues of the shore, to the Perdido river, and thence up the same to the beginning."

The Act admitting Alabama as a State of the Union defined its boundaries in the same language.

Political Code 1907, p. 35.

The Constitution of Florida (Revised General Statutes of Florida, Vol. 1, p. 22) thus designates the boundaries of Florida:

> "The boundaries of the State of Florida shall be as follows: Commencing at the mouth of the River Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama and the thirty-first degree of north latitude; thence due east to the Chattahoochee River; thence down the middle of said river to the Atlantic Ocean; thence straight to the head of the St. Mary's River; thence down to the middle of said river to the Atlantic Ocean; thence southeastwardly along the coast to the

> edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf stream and Florida reefs to and including the Fortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land to a point west of the mouth of the Perdido River; thence to the place of beginning."

Florida, then composed of East and West Florida, was originally owned by Spain. The treaty with Spain, executed by our government in 1819, by which Spain ceded to the United States her title to East and West Florida, can be found in Volume 1, Revised Statutes of Florida, 1920, pages 236 et sequitur. Article 2 of this treaty provides:

> "His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings, which are not private property, archives and documents, which relate directly to the property and sovereignty of said provinces, are included in this article."

It is not necessary, we think, to delve into ancient archives and determine to a needle point the exact boundaries of the territory originally owned by Spain. All the territory she owned, embraced in East and West Florida, was ceded to the United States. This cession covered Perdido River from its source to where it empties into the Gulf of Mexico, including all islands in the Gulf "dependent on said provinces." All the territory included in East and West Florida, with the islands adjacent thereto, having been ceded to the United States, the latter government could carve out of the territory so ceded a state or states and fix the boundaries of the state or states so created.

In admitting the territory and state of Alabama, the Federal Government defined its boundaries as above shown. Alabama was admitted into the Union in 1819 and its boundaries defined. In 1845, Florida was admitted into the

Union, and Section 5 of the act admitting Florida provides:

> "That said State of Florida shall embrace the territories of East and West Florida, which, by the treaty of amity, settlement and limits between the United States and Spain, on the twenty-second day of February, 1819, were ceded to the United States."

It must be remembered that at the time Florida was admitted into the Union, and also at the time Alabama was admitted into the Union, the Federal Government, by cession or conquest, owned *all* the territory embraced by the *now* states of Alabama and Florida. The United States, therefore, owning both Florida and Alabama, could admit both states into the Union and could definitely define the boundaries of each state so admitted. All the area included in Florida and Alabama belonging to the United States, by cession or conquest, the United States could prescribe the terms on which each was admitted to statehood and could conclusively define the boundaries of each state.

Alabama was first admitted into the Union, and the act defining its boundaries shows that the mouth of Perdido Bay, as it now appears on the map, was *then* considered the mouth of Perdido River. The constitution of Florida, as above shown, in defining this particular line between Florida and Alabama, says:

> "Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama and the thirty-first degree of north latitude."

It is an ordinary rule of construction that, where a river is designated as a boundary line between two states, each state owns to the middle of the stream.

Howard v. Ingersoll, 17 Ala. 780.
Howard v. Ingersoll (U. S.), 14. L. ed. 189.
Alabama v. Georgia (U. S.), 16 L. ed 556.

In the instant case, the usual rule is emphasized by the specific statement that the boundary line between Florida and Alabama *is* the middle of the river.

We think, from an inspection of all available maps, and a necessary implication from the boundaries fixed by law, that the mouth of Perdido River is where its waters empty into the Gulf of Mexico. In other words, Perdido Bay, as now designated on the map, is simply an extension or continuation of Perdido River.

We hold, therefore, that a bridge across Perdido Bay is property taxable in Alabama to the middle of the river or bay. The fact that this particular taxpayer, a resident of Baldwin County, Alabama, has paid the entire taxes on these bridges to the State of Florida does not relieve him or his property situated in Alabama from taxes due on said property in Alabama. If that part of the bridge located in Alabama has never been assessed for taxes in Alabama, the property should now be assessed as an escape.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

COUNTY DEPOSITORY:—Should refuse to pay warrant issued for debt not properly chargeable to county.

April 2, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

The request of your Mr. P. B. Jarman, Jr., Assistant Examiner of Accounts, dated February 17, 1921, addressed to the Attorney General, for an opinion upon the responsibility of a county depository created under the Act approved September 15, 1915, Acts of Alabama of 1915, page 348, has been referred to me by the Attorney General, and I beg to advise you as follows:

The question upon which you ask the opinion is as follows:

> "Has a county depository authority of law for refusing to pay any properly drawn warrant which is signed by an officer authorized to sign same, unless it

is so instructed by the officer who drew the warrant, provided the depository has funds for that purpose?"

Section 5 of this Act creating the county depository contains the following statement:

> "The bank or banks so designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities in so far as the safe-keeping and paying out of the funds of the several counties are concerned, as are now inposed by law upon the county treasurers."
>
> Acts of Alabama of 1915, page 349.

The case of First National Bank of Abbeville v. Terry, Briggs & Company, 203 Ala. 301, construes the duty and responsibility of the depository with respect to meeting a demand for payment of warrants which has been issued for a debt within the authority of the Court of County Commissioners and where such debts had been passed upon and allowed, and the warrants properly issued. One Supreme Court in that case by Justice McClellan said as follows:

> "The following provisions of Section 5 of the Act of 1915 (referring to said provision which is above set out) imposed upon the depository the duty to meet the demand for payment just as would have been the county treasurer's duty had that office not been abolished, and had the demand been made upon the county treasurer."

The language of the Act seems to me clearly to indicate that the county depository is charged not only with all the duties and with being subject to the same liabilities in so far as the safe keeping of such funds is concerned, but it is likewise charged with all the duties and with being subject to the same liabilities as were imposed by law on the county treasurer at the time the Act was enacted with respect to paying out of such funds. In the case of First National Bank of Abbeville v. Terry, Briggs & Co., the Supreme Court said:

> "While a depository is not a public officer in the common acceptation of that term, a depository is a

contractee with positive law-imposed, ministerial duties performance of which may be compelled in proper cases by a writ of mandamus."

Under the law which governed county treasurers at the time said Act was enacted, it was the duty of a county treasurer to refuse to pay a claim although such claims had been audited and allowed by the county commissioners, if the claim was not properly chargeable to the county, and if the treasurer paid such claim, he did so at his peril, and the fact that the claim had been audited and allowed by the commissioners would not be a protection to the treasurer if either upon the face of the claim, or upon the face of the records, of the Court of County of Commissioners, or otherwise, evidence was brought home to the county treasurer that the claim was in fact invalid although it had been allowed by the Court of County Commissioners.

Mobile County v. Williams, 61 So. Rep. 963.

It is true that the Act of 1915 above referred to provides, "Such officer signing such warrant shall be liable for the amount of any warrant drawn and paid by such depository without the authority of law," but I think that the mere fact that such officers are made liable in this instance does not authorize the conclusion that the depository is not also liable in the face of the plain language of the Act above quoted with reference to the duties and liabilities of the depository with respect to paying out such funds. Many instances could be quoted where liability attaches upon a number of different officers for the commission of an unauthorized act although there might not be a recovery against more than one of them.

It is my opinion, based upon the above authorities, that a county depository is authorized to refuse to pay a warrant, which has been allowed, or issued for a debt not properly chargeable to the county, although the warrant has been signed by an officer who is authorized by law to sign and issue warrants.

Yours very truly,

HUGH WHITE,
Assistant Attorney General.

JUVENILE COURT OF MOBILE:—Girl who has passed sixteenth birthday is beyond jurisdiction of court.

April 4, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

Dear Mrs. Bush:

Mr. Green, of your department, has requested to be advised whether a girl who has passed her sixteenth birthday but has not reached her seventeenth is within the classification contained in the Mobile County Juvenile Court Law (Local Acts 1915, p. 116), of "sixteen years of age or under."

After passing the sixteenth birthday, a child is not "sixteen or under," but is "over sixteen."

State v. Lanassa, (La.), 51 So. 688.
Gibson v. People, 44 Colo. 600, 99 Pac. 333.

If the girl in question has passed her sixteenth birthday, she is beyond the jurisdiction of the Mobile County Juvenile court.

Yours very truly,
BERNICE SUMMERS,
Assistant Attorney General.

CONVICTS:—When sentence becomes effective in appealed cases.

April 4, 1921.

Hon. W. F. Feagin,
State Warden General,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 11th ult., wherein you make inquiry as to when the sentence of one convicted of crime becomes effective in cases which are appealed to the Supreme Court or Court of Appeals.

When a defendant is tried in a lower court, convicted and sentenced, the sentence goes into immediate operation according to its mandate, unless the Court makes an order

by which the execution of the sentence of the law is suspended.

Exparte Goucher, 103 Ala. 306.

In cases in which appeal is taken, the execution of the judgment may be suspended pending the appeal or the defendant may take the appeal and elect not to have the judgment suspended pending his appeal, and serve while the appeal is pending. He is entitled to bail pending his appeal if he does not elect to serve, in all cases except felony cases in which the sentence exceeds the period of five years.

Code 1907, Secs. 6249, 6250.
Acts 1911, p. 113, 626.
Acts 1919, p. 84.

After a case is affirmed the duty devolves upon the clerk of the Appellate Court to send a certificate of affirmance to the clerk of the lower court—Code 1907, Sec. 5987 subdivision 5—which operates as notice to the lower court that the case has been affirmed, and it then becomes the duty of the lower court to put the sentence into effect in all felony cases, unless the defendant has elected to serve on his sentence pending his appeal, in which latter event he will continue to serve until the expiration of his time.

In misdemeanor cases the rule appears to be different. Section 6252 provides that when a defendant in a misdemeanor case is sentenced to hard labor or imprisonment and gives bail pending appeal, and the judgment of conviction is affirmed or the appeal is dismissed, he is bound by the undertaking of bail to surrender himself to the sheriff, at the county jail, "within fifteen days from the date of such affirmance or dismissal," and if he fails to do so the sheriff must endorse the bail bond forfeited. This statute appears to give the defendant fifteen days from the date of affirmance or dismissal in which to surrender himself and it would appear that in misdemeanor cases the sentence would not become effective before the expiration of that time unless the defendant should sooner surrender himself, but when he does so, the sentence becomes operative. If in misdemeanor cases, the defendant is not bailed pending appeal, but on the contrary elects to serve, he would merely continue service under his sentence.

If, after notice of affirmance is sent down by the clerk of the appellate court to the clerk of the lower court, an application for re-hearing should be applied for, and counsel filing such application should request and obtain a withdrawal of the certificate of affirmance, the convict is again restored to the status held by him before the notice of affirmance was sent down.

Code 1907, Sec. 5987, subdivision 5.
Supreme Court Rule 38.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

CONDEMNED FEED STUFFS:—Department of Agriculture may pay court costs and storage charges, if no other provision should be made for payment.

April 4, 1921.

Hon. M. C. Allgood,
Commissioner of Agriculture and Industries.
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 30th ultimo, relative to 114 sacks of commercial feeding stuffs condemned by the judge of the 11th Judicial Circuit.

You propound four questions, as follows:

(1). How should the matter of court costs be disposed of in the event the property should be sold?
(2). How should the matter of court costs be disposed of in the event the property has so deteriorated as to be unfit for sale and use?
(3). How shall the payment of charges for storage be disposed of in the event the property should be sold?
(4). How should the payment of charges for storage be disposed of in the event the property should have so deteriorated as to be unfit for sale and use?

I shall dispose of the inquiries in the order above stated. It is provided in Section 11 of Acts 1919, p. 1070, that

if it is found that the feeding stuff violates the provisions of the Act, the court shall enter a decree forfeiting the feeding stuff and providing for the delivery thereof to the Commissioner of Agriculture and Industries, who is required to dispose of it to the best advantage, and that "any funds arising from a sale or disposition of any forfeited feeding stuffs shall be paid into the State Treasury," etc.

No provision is made in the Act as to payment of costs. It therefore becomes necessary to determine the questions as to payment of costs under the general rules applying on the subject of taxation of costs. This general rule is stated in Section 3662 of the Code of 1907, as amended by Acts 1915, page 598, which reads as follows:

> "The successful party in all civil cases is entitled to full costs for which judgment must be rendered, unless in cases otherwise directed by law, or by the judgment of the court. The court may apportion the costs at his discretion as justice and equity may require; and this provision is applicable in all cases of individual suitors."

It appears from the decree rendered in the instant case that no mention is made of costs, so the State being the successful party, is entitled to recovery of costs as against "the property seized as defendant," provided the property should sell for a sum sufficient to pay the costs or any part thereof.

In the event the property should not be of any value and no party defendant is joined, under the general rule applying in this State, as seen from the statute above quoted, the costs may be taxed against the State, although the State cannot be required to pay, as it cannot be sued.

Your Mr. Moore stated to me in conversation that if, in cases in which no funds could be realized from sale (in which cases as stated above the State cannot be *required* to pay costs), costs should not be paid, it was feared that court officers would become slow and careless and unconcerned in giving services in these condemnation cases and thus cripple your department in such condemnation proceedings. It is the duty of every officer to give the service when called upon regardless of how the matter of costs should terminate, and they would be subject to impeach-

ment for failure to do so, but I can readily understand how officers would be more zealous in such work if they knew they would be compensated for it than if they had reason to doubt whether they would be paid because of failure to collect for services previously rendered. While, as stated, the State cannot be required to pay such costs, there is nothing to prevent it from doing so voluntarily if deemed for the best interests of the State that it should be done. Mr. Moore stated that you had to the credit of your department ample funds to take care of such cases. This expense could, in my opinion, be paid under the provisions of Section 18 of Acts 1919, p. 94, which authorizes payment out of this fund of "all expenses incurred in enforcing the Act," as such expense would be incurred by the State in the enforcement of the Act.

As to the item of storage charges, Mr. Moore stated that the storage charges referred to in your letter in the instant case, were not storage charges incurred in a regular warehouse, but were claims for storage made by the person holding such feed stuffs in his own private building at the time of seizure. Section 11 of the Act referred to above, provides that notice of seizure shall be given "and any person interested shall have 30 days after seizure in which to propound his claim *to the commercial feeding stuff*" and "if after 30 days from the date of seizure, no claim is filed thereto, the court trying the case as a court of equity and without a jury must determine, whether or not the feeding stuff seized violates the provisions of this Act in the particulars set out in the affidavit, and if it be found that the feeding stuffs violate the provisions of this Act in the particulars set out in the affidavit, the court shall enter a decree forfeiting the feeding stuff seized to the State of Alabama," etc. No provision is made for claims except for the property itself.

Under the provisions of the Act, the writ of seizure may be executed by any authorized representative of the Department of Agriculture and Industries or by any sheriff or constable in the State. After such seizure the goods would be *in custodia legis*, that is in the custody of the law, and in the hands of the party executing the writ, who should arrange for the storage of the goods, either with the party

in whose hands they may be seized or another, as may be preferred.

In all cases in which the State procures the issuance of a writ of seizure, it would be under a moral obligation to pay the reasonable charges incurred for storage pursuant to such terms as might be agreed upon by it or by the seizing officer or in the absence of such agreement by order of the court, unless a claimant should intervene and the issue should be found against him and the court should order that he pay all costs and expenses connected with keeping the property pending the suit and the costs in the case, the proceeds of sale not being sufficient for that purpose. 6 C. J., 370, Sec. 819.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Local acts regulating general fund, but referring in title only to fine and forfeiture fund, are unconstitutional.

April 4, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of March 26, 1921, states that Hon. Frank Peabody wishes to be advised whether the Local Act entitled "An Act to regulate the fine and forfeiture fund of Cullman County and provide for the registration and payment of claims against said fund" (Local Acts 1915, page 487), and the Act amendatory thereof approved August 11, 1919 (Local Acts 1919, page 55), are valid or not.

The Act approved September 26, 1915, not only seeks to regulate the fine and forfeiture fund of Cullman County, but also contains a number of provisions relative to the general fund of that county. The provisions relative to the fine and forfeiture are so interwoven with the provisions relative to the general fund that it is impossible to strike down the provisions relative to either fund and leave a complete Act relative to the other fund. The Supreme Court of Alabama has directly held that the fine and forfeiture fund is dis-

tinct and separate from the general fund of the county, and that an act, the title of which proposed only to regulate the fine and forfeiture fund of a county, was unconstitutional if the Act attempted also to regulate the general fund of the county.

Sanders v. Court of County Commissioners of Elmore County, 117 Ala. 543.
Pierce v. Court of County Commissioners, 117 Ala. 569.
Ryan, Treas., v. Collins, 196 Ala. 478; 71 So. 690.

In my opinion these decisions are conclusive to the effect that the Local Act of 1915 which seeks to regulate the fine and forfeiture fund of Cullman County is unconstitutional and void. The Local Act of 1919 which seeks to amend the 1915 Act is dependent on the Act which it seeks to amend and is, therefore, also unconstitutional and void as it cannot stand alone.

Yours very truly,
HARWELL G. DAVIS.
Attorney General.

FEEDING PRISONERS:—Fuel used in cooking food at jails may be charged to county.

Hon. Chas. E. McCall, April 5, 1921.
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You have referred to this office a letter from Sheriff G. N. Corbett, containing the following inquiry:

> "In receiving pay for cooking and preparing food for prisoners, including the buying of wood and other fuel used in cooking same, must I look to the State as provided in Section 3, of a recent Act of the Legislature, or must I look to the Commissioners' court?"

The recent Act of the Legislature (Acts 1920, p. 28), changed the system previously in use by separating the cost of food from the cost of preparation. A maximum allowance is made for the actual cost of foodstuffs, and a fixed allowance for the preparation of the food.

In an opinion of this office of date November 18, 1918, addressed to the State Prison Inspector, it was held that

the county should furnish the coal or other fuel necessary to prepare meals for the prisoners in the jail. The State Prison Inspector and the sheriffs have been operating in accordance with this construction for several years.

Where officials have been instructed by opinions given by the Attorney General, and have been acting upon such interpretation of the law, such interpretation and practice will be of great weight in construing the law. Where there is doubt as to the meaning of a statute, the contemporaneous construction given by the workers administering the law should be looked to in reaching a conclusion.

Shepherd v. Sartain, 185 Ala. 456.
State v. Board of Commissioners of Mobile County, 183 Ala. 554.

This being the practice at the time of the enactment of the 1920 Act, and no specific change being made by the Legislature, it should be assumed that the Legislature did not intend to disturb the practice of the prison inspector and the sheriffs in this respect.

It is true that the 1920 statute makes allowance for "preparation of food," but the allowance is not reasonably sufficient to cover more than the cost of employing cooks, and the reasonable and evident meaning is to be adopted where there is ambiguity.

Yours very truly,
BERNICE SUMMERS,
Assistant Attorney General.

MORTGAGE PRIVILEGE TAX:—New instrument reciting greater indebtedness calls for tax on full amount named therein, without credit for tax paid on cancelled instrument.

April 7, 1921.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

This office is in receipt of two letters from Hon. John T. Heflin, Judge of Probate of Randolph County, also of let-

ters to you from Judge Heflin, in regard to privilege tax on a certain mortgage. (Acts 1919, page 420.)

It appears that The W. A. Handley Manufacturing Company executed a mortgage to the Central Bank & Trust Company of Atlanta, Georgia, for the sum of two hundred thousand dollars, ($200,000.00). The mortgage was filed for record and a privilege tax of one hundred fifty dollars ($150.00) paid to the probate judge. One month later a new mortgage was filed, in the sum of three hundred thousand dollars ($300,000.000), by the same parties, and the first mortgage was canceled.

As we have not the original mortgage before us, we are not certain as to whether they differed as to time of maturity, but they certainly differed as to amount. If either the time or the amount is changed, the second instrument is entirely new and the lender is liable for the privilege tax on the full amount of indebtedness covered thereby.

The opinion of this office found on page 120 of the report of the Attorney General for 1912-14 held pointblank that if either time or amount had been changed the tax should be paid.

The privilege tax was first imposed in 1903 (page 184), appeared in the Code as Section 2082, subsection 7, and in the revenue bills of 1911, 1915, and 1919. There has been practically no change in the provision that an extension or renewal stating a different amount or different time of maturity constitutes a new instrument.

In an opinion of the Supreme Court rendered May 22, 1913, it was said:

> "This statute is intended for the purpose of raising revenue by requiring people who desire the protection by the registration of their instruments to pay for the privilege of doing so."
>
> State ex rel. Continental Trust Co. v. Still, 62 South, 534.

The lender had the privilege of protection for one month under the mortgage first filed. Protection for one month is under the statute valued at the same rate as protection for one year or fifty years. The rate is fixed according to the amount, and not according to the length of time the protection remains in force.

I am, therefore, of the opinion that both mortgages referred to in Judge Heflin's letter were subject to the privilege tax for the full indebtedness secured by each.

Yours very truly,
B. SUMMERS,
Assistant Attorney General.

ATTENDANCE OFFICER:—Power and authority in making investigations in homes of pupils.

April 7, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

My dear Mrs. Bush:

I have for reply your letter of April 1st, in regard to the duties of the attendance officers in this county.

(1) Sections 7 and 10 of Article 15 of the General School Law of 1919 (pages 616-18) require the attendance officer to "investigate" and to leave a notice with the parent or some other person over 12 years of age. This does not confer the right of entering into the home of the pupil. If admittance is denied and notice refused, complaint should be filed by the attendance officer in a court having jurisdiction of such cases.

(2) Interfering with an attendance officer who is attempting to enter a home is not resisting an officer in the technical sense. Such attitude of the parent goes to prove the parent's responsibility for the child's nonattendance and is as effective as an investigation of the home itself.

(3) Under Section 2 of the Juvenile Court Law applicable to Montgomery County, jurisdiction is given over those who come "within the provisions of any law, regulation, or ordinance for the education, care, or protection of children."

This, together with Section 19 of the Law (Acts 1920, page 86), would clearly give authority to the juvenile court to hear complaints against parents or guardians who refuse to send their children to school.

Yours very truly,
B. SUMMERS,
Assistant Attorney General.

CHILD WELFARE:—Foreign institution placing children in Alabama should comply with State law.

April 7, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

My dear Mrs. Bush:

In reply to your letter of March 3rd, in regard to the right of the American Rescue Workers and other agencies to place children in homes in Alabama, I beg to advise that in my opinion any one engaged in child placing in this state would first have to obtain from your department a permit, and failure to do so would constitute a misdemeanor.

An Atlanta Maternity Hospital engaged in placing children in Alabama would violate our laws unless they obtained a permit from your department and complied with your rules and regulations. Any agent of such institution operating in this state without a permit having been issued to the institution may be arrested in this state and prosecuted for a misdemeanor and punished as provided by law. (Acts 1919, page 694.)

Yours very truly,
B. SUMMERS,
Assistant Attorney General.

JUVENILE COURTS:—Conduct and jurisdiction.

April 7, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

My dear Mrs. Bush:

I have the letter from Mr. Lemuel B. Green to you of March 14th to which I will reply using the same paragraph numbers:

1. (1) The judge of the juvenile court of Mobile County would be disqualified from hearing in the juvenile court a case that he had adjudicated on the bench of the inferior court.

(2) In case of disqualification Section 4627 of the Code controles.

(3) The judge has not the right to appoint another attorney to preside over his court in his absence.

2. The Mobile Juvenile Court has the right to punish for contempt of court those who obstruct the probation officer in the discharge of his duties. (Acts 1915, page 587.)

3. The juvenile court is in no wise a criminal court, but is a court organized for the protection of children. The question whether or not a child eleven years of age may be charged with vagrancy need not be answered, since this would come under the juvenile court, and the child could not be tried in any other court in this state. In the juvenile court the judge may take up and consider the entire environment of a child brought into the court, and change the offence with which it is charged, or withdraw any charge against a child altogether, it being wholly within his discretion.

(1) It is not the purpose of the juvenile court law to enter a judgment against the child, except in a general way, holding the child under the supervision and control of the court or "some person or institution at the instance of the court."

4. The juvenile courts of the state are not courts of record, but it is the duty of the clerks of said courts to keep records of the proceedings, in such form and in such way as that the business of said court may be carried on and thoroughly understood by the public at large.

(1) It is not a matter of consequence whether the judge signs the docket.

(2) The docket judgments are just as binding without his signature as if signed by him.

5. Bonds may be approved by the judge of the juvenile court.

(1) The clerk of the juvenile court may at the instance, direction, and request of the juvenile court judge, sign all papers issued out of that court.

(3) In my opinion the sheriff may approve bonds in juvenile cases.

6. This question has been answered in another letter.

7. In the absence of the provision that jurisdiction, having been once obtained, shall continue during the minority of the child, the Mobile Juvenile Court loses jurisdiction after the child passes its sixteenth birthday.

8. The Mobile Juvenile Court, having jurisdiction over delinquent children only, could not exercise jurisdiction over a baby left without parents or relatives and temporarily cared for by an institution.

(2) Such dependent children should be handled by the probate court, under the general law. (Acts 1915 page 577, amending Code Sections 6450 to 6465.)

9. A child violating the conditions of its probation may be brought in on the original petition and summons.

10. Section 6 of the Mobile Juvenile Court Law does not contemplate that a child shall be committed to an institution beyond the state.

Yours very truly,
B. SUMMERS,
Assistant Attorney General.

TAXATION:—Assessment of shares of stock in foreign corporations owned by residents of Alabama, under section 5 of 1919 Revenue Law.

April 8, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My dear Sir:

Your inquiry as to whether shares of stock in a foreign corporation can properly be assessed against the shareholders under Section 12 of the Revenue Law of 1919, (Acts 1919, page 290) naturally resolves itself into several possible situations:

First: An assessment against one or more resident owners of stock in a foreign corporation, which corporation owns no property in Alabama and has no office or place of business in this State.

Second: An assessment against resident owners of stock in a foreign corporation, which corporation owns property in Alabama and has qualified under our laws to

do business in Alabama, there being other stockholders in other states.

Third: An assessment against resident owners of stock in a foreign corporation where all the owners of said stock reside in Alabama and where all the property owned by said corporation is located in Alabama.

Fourth: An assessment against resident owners of stock in a foreign corporation, where all the owners of said stock reside in Alabama, but where the property owned by said corporation is partly located in Alabama and partly located outside of Alabama.

We think the above enumeration covers all conceivable instances where residents of Alabama own shares of stock in foreign corporations.

Section 12 of the revenue law of 1919 provides in substance that every share of any corporation, except banks or banking associations, shall be assessed and the taxes thereon collected in the county wherein such corporation has its *home* or *chief office in the State,* and shall be assessed at sixty per cent of its reasonable cash value to *the person* in whose name such shares stand on the books of the corporation, and not to the corporation. This section further requires the president or managing officer of every such corporation to make out and return under oath to the assessor of the county, in which the *home* or *chief office* of the corporation is located, a list showing the total number of shares of capital stock of such corporation, the par value thereof, the full name and residence of each shareholder, etc. The corporation is required to pay the tax for the shareholders and is given a lien on the stock for the amount of taxes paid. For the purpose of arriving at the value of the shares for taxation, the corporation is entitled to deduct from the value of its shares as returned the *assessed value* of property owned by such corporation in other states or countries on the next preceding first of October.

Section 13 of the revenue law requires the State Tax Commission to furnish blanks covering the assessments of corporations. And section 14 provides that if the corporation on its accessment, or otherwise in writing, agrees to pay the taxes assessed on the shares for the shareholders it need not file a *list of such shareholders.*

It will be noted that in the instance named in Section 14 the corporation is not excused entirely from making the required report, but this section only permits the omission of certain data from the report, when the corporation complies with this section.

The history of the above cited sections of our present revenue law is necessary to an understanding of their meaning and import.

Section 453, subdivision 9, of the Code of 1886, levied an ad valorem tax in these terms:

> "The capital stock of all corporations, companies, or associations, created or existing under any law in force in this state, except such portions of the capital stock as may be invented in property which is otherwise taxed as property, the same to be paid by the corporation, company, or association, etc."

This, it will be noted, is a tax levied against *the corporation itself* on the capital stock of the corporation, considered as an entity, and not against the several shareholders of said stock. The *capital stock* of a corporation, as distinguished from the divisible ownership among the several shareholders, was and is a proper subject of taxation against the corporation itself. Subsequent legislatures, acting on the equitable theory that capital stock should be taxed only *once*, have disregarded the legal fiction which permits an assessment of capital stock both against the corporation itself and against the several owners of said stock.

The above quoted provisions of the Code of 1886, which levies the tax against the corporation itself on the capital stock as an *entity*, was construed by our Supreme Court in the case of State v. Stonewall Insurance Company, 89 Alabama, 335.

Quoting the material parts of the decision in this case, an opinion rendered by Justice Clopton:

> "A controlling question which presents itself at the outset is, whether the tax levied upon the capital stock is a tax upon the property or upon the privileges and franchises of the corporation? Appellant insists it is a franchise tax. This insistence is based on the

> theory that Section 478 (Code, 1886) prescribes, as the rule for determining the value of the capital stock for the purpose of taxation the aggregate market value of the shares into which it is divided."

It is necessary to note that 478 of the Code 1886 required the president or chief officer of every corporation, not otherwise regulated as to taxation by the laws of the state, to make a return as to the market value of its capital stock. This tax, being levied against the *corporation itself*, and not against the shareholders because of their ownership of said stock, was held to apply only to the *corporation* and not to the owners of the shares therein.

The distinction between an assessment of the capital stock of a corporation as an *entity* against the *corporation itself* and an assessment of the same stock against the several *individual owners* of the same was best stated by Judge Stone in Sumter County v. National Bank of Gainesville, 62 Ala. 464. Quoting from this opinion:

> "It is very true, as stated in National Commercial Bank v. Mayor, supra (62 Ala. 285), that the distinction between the *capital stock* of a bank and the shares of stock in the bank itself is somewhat technical; the former being but the aggregation of the latter. But it is the difference between the several parts and the whole; between the tributaries and the congregated volume which forms the river; between the several partners and the aggregated partnership; between an artificial entity, called a corporation, having a local habitation and a name, capable of suing and being sued, and which may survive all the shareholders of any given period, and the several owners of the shares, who are commonly real persons, and who may undergo constant change, by transfer or death, without disturbing or affecting the continuance or identity of the corporation. They are, in law, different persons."

The Stonewall Insurance Company case and the Bank of Gainesville case, above quoted from, were construing revenue laws, which levied a tax on capital stock as *an entity* against the corporation itself. And the provisions of the then existing laws (Section 478 of the Code of 1886), requiring the president or chief officer of the corporation to

return to the tax assessor a list showing the market value of the capital stock of the corporation, and the items of its property into which its capital was divided, were construed in these two cases as applying to assessments against the *corporation itself*, and not against the several shareholders of said capital stock.

Section 3911 of the Code of 1896, in enumerating the subjects of taxation, provides for the assessment of shares of stock in these terms, in subdivision 9 of said section:

> "Every share of *any corporation organized under the laws of this State, or any other state, or of the United States* (other than railroad, telegraph, express and sleeping car companies, building and loan associations, and banks or banking associations), to be assessed and collected in the county wherein such corporation has its *chief* or *home office* in this State, and to be assessed, at its actual market value, *to the person* in whose name such shares stand on the books of the corporation, and *not to the corporation.*" (Italics ours.)

This section further requires the president or chief officer of every such corporation to make and return under oath to the assessor of the county in which the *chief* or *home office* of the corporation is located, a list showing the total capital stock of such corporation, the number of shares into which the capital stock is divided, and the par value thereof, and the full name and residence of each shareholder, etc. The assessed value of the corporation property, *situated in this State*, is deducted from the total assessed value of the entire capital stock and the residue of values remaining after such deduction shall be the assessed value of the whole of such shares. The corporation is required to pay the tax assessed against the shares for the shareholders, but no lien on said shares is given by this section in favor of the corporation for the taxes so paid for the shareholders.

As above noted, the assessment of capital stock, under the Code of 1886, as construed in the Stonewall Insurance Company case and the Bank of Gainesville case, supra, was against the *corporation itself*. The Code of 1896, above quoted from, changed this method of assessment, making it against the *shareholder* instead of against the *corporation*, as formerly.

The changed provision in the Code of 1896 was first construed by our Supreme Court in State v. Kidd, 125 Ala. 413 (affirmed by the United States Supreme Court on appeal in 188 U. S. 730). The Kidd case has since been recognized by all courts of this country as the leading case concerning taxation of shares of stock in foreign corporations owned by residents of any particular state.

Quoting from the opinion of Justice Sharpe in the Kidd case:

> "Shares in stock of corporations are property and by our statute they are made to come within the term, personal property. Code Sec. 3906, (parenthetically, subdivision 2 provides):
>
> "The term ' personal property' shall be held to mean and include all things, other than real property, which have any pecuniary value, and moneys, credits, and investments, in any bonds, stocks, joint stock companies, or otherwise."
>
> "Such property is intangible and incapable of having an actual location, and its anomalous character has given rise to some difficulty in fixing its legal situs. In Varner v. Calhoun, 48 Ala. 178, it was held that a tax on stock in a foreign corporation, though expressly named as taxable by the existing statute, could not be collected. That decision, however, appears to be against the weight of authority and at variance with the principle declared by this court in Boyd v. Selma, 96 Ala. 144. The latter case, we think, asserts the true doctrine, which is to the effect that, unless otherwise fixed by statute, the situs of shares of stock for the purpose of taxation is at the owner's domicile. * * * We are unwilling to follow the decision in Varner's case, supra, and it must be overruled. * * *
>
> "While the words used in the beginning of this subdivision 9, standing above, would seem to include *all corporations,* the provision, taken as a whole, would be meaningless and abortive in respect of foreign corporations having neither property nor habitation in this State, since the fixed plan of assessment would not be pursued either as to place or property. A reasonable interpretation of this whole provision for taxing shares confines it to shares in corporations having taxable

> property in this state. * * * That ownership of shares in capital stock is distinct from ownership of capital stock itself is generally, if not everywhere, recognized. Such shares are property, and, as such, belong in and are taxable in the State of the owner's residence, irrespective of legislation in another State."

In the Kidd case, supra, the shares of stock assessed against a resident owner of same were shares owned in a foreign corporation which had no property in Alabama and no office in this State. Our court held that such an assessment could not properly be made under subdivision 9, Section 3911, of the Code of 1896, as the foreign corporation itself had no habitat in this State. The assessment against the *resident owner* of such stock was, however, sustained under another clause of the then existing tax law.

The above decision was reviewed by the United States Supreme Court in 188 U. S., page 730. Mr. Justice Holmes, in delivering the opinion of the court in this case, said:

> "We see nothing to prevent a State from taxing stock in some domestic corporation and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the *State must tax the stock held within the State*, if it is to tax anything, and we are assuming the right to tax stock in foreign corporations to be conceded. * * *
>
> "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. Coe v. Errol, 116 U. S. 517, 524; Knowlton v. Moore, 178 U. S. 41; Dyer v. Osborne, 11 R. D. 321, 327; Cooley, Taxation, 2nd Ed. 221. * * * The State of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its

laws, then for the purpose of its laws the property is not taxed at all.

"It is said that the State may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The State does nothing of the kind. It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the State's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a State, and the property of the corporation outside it."

The Kidd case, supra, was approved and followed by the United States Supreme Court in Hawley v. Malden, 232 U. S. 1.

Subdivision 9 of Section 2082 of the Code of 1907, which levies a tax on shares of capital stock against the shareholders. is practically identical with the similar provision in the Code of 1896. They differ, however, in one material particular. The Code of 1896 levied the tax on every share of any corporation "organized under the laws of *this State,* or *any other State,* or of the United States." The Code of 1907 levies the tax on "every share of *any corporation* except banks, etc." There is no necessary change of meaning by this change in language, as the language last used is still broad enough to embrace foreign corporations. The last provision, however, is not so *expressly inclusive* of foreign corporations as the first.

The Revenue Law of 1915, Section 14 (Acts 1915, p. 395), re-enacts practically verbatim the Code provisions of 1907. There does appear in the Revenue Law of 1915, for the first time, according to my investigation, a separate and specific designation of shares of stock in foreign corporations as property subject to taxation in this State. Subdivision 9, Section 7, of the Revenue Law of 1915 (Acts 1915, p. 391), provides:

"All dividends declared or earned, and not divided, by corporations doing business in this State. Shares of stock in companies or associations not incorporated under the laws of this State, except stock in national banks."

The Revenue Law of 1919, as to the *specific* assessment of shares of stock in foreign corporations, and as to the assessment of corporation stock generally, is identical with the Law of 1915. (Acts 1919, p. 286, Section 5, Subdiv. i, id., p. 290, Sec. 12.)

The result of this resume of the history of our Revenue Laws concerning taxation of capital stock may be briefly summarized:

First: The tax against capital stock levied by the Code of 1886 was against the *corporation itself*, and not against the several shareholders therein, and was applicable only to *domestic* corporations.

Second: The Code of 1896 levied the capital stock tax against the *individual shareholders* and, in express terms, the tax thus levied applied (1) to domestic corporations, (2) to foreign corporations, and (3) to corporations organized under the laws of the United States. As held by Judge Sharpe in the Kidd case, supra, the tax thus levied could not in the nature of the case apply to any foreign corporation which had not acquired a habitat in Alabama.

Third: The Code of 1907 and all subsequent revenue laws—the tax still being levied against the *several shareholders*, and not against the *corporation* itself—apply to *"any corporation,"* instead of the theretofore express designation of both foreign and domestic corporations.

Fourth: The express enumeration of shares of stock in foreign corporations, as a specific subject of taxation, first appeared in the Revenue Law of 1915 and has continued to be the law since.

The Stonewall Insurance Company case, correct in itself as construing a statute assessing capital stock against the *corporation*, was for a time incorrectly applied by our Supreme Court in construing subsequent statutes which levied the tax against the*shareholder* and not against the *corporation*. The inapplicability of the Stonewall Insurance Company case, and the Elmwood Cemetery Case, 170 Ala. 549,

(which followed the Stonewall Insurance Company Case), is clearly pointed out by Chief Justice Anderson in State v. Lovejoy, 188 Ala. 401. Quoting the pertinent parts of the opinion in the Lovejoy case:

> "Section 2082 of the Code of 1907, Subdiv. 9, provides for the assessment of every share of stock of any corporation therein embraced, and, while the assessment must be made by the officer of the corporation, and the tax is to be paid by the corporation, it was the manifest purpose of the Legislature to levy the tax on the shares of stock and *against the holder thereof, as distinguished from the corporation itself.*" (Italics ours.) * * *
>
> "The tax is therefore levied against the share, and, though paid by the corporation, must necessarily come out of the shareholder in the end, as the corporation is given a lien on the share for the tax paid thereon. * * * In other words, a liability is fixed against the shareholder and the method of enforcing same is provided. * * *
>
> "The distinction between an assessment against the shares of stock held in a corporation and an assessment against the corporation proper has been generally recognized and regarded by nearly all the courts of the land." * * *
>
> "The opinion in the case of Elmwood Cemetery Co. v. Tarrant, 170 Ala. 549, in interpolating into the present statute 'exempt,' as well as assessed property, is unsound, and it is expressly overruled. The reason for said interpolation seems to be based upon the case of State v. Stonewall Insurance Co., 89 Ala. 385, wherein the assessment was on the *capital stock* of the corporation and *against the corporation,* and not upon the shares of stock therein and against the *shareholder.* In other words, the present statute seems to have been framed so as to avoid the influence of the opinion in the case of Stonewall Insurance Co. v. State, supra."

The history of our revenue laws, and the above referred to decisions construing them, show that a clearly defined distinction has been drawn between assessments of capital stock, as an entity, against the corporation itself, and assessments of the capital stock against the several shareholders.

The assessment of capital stock, under Section 12 of the Revenue Law of 1919, being against the *shareholder,* and not against the *corporation itself,* the question still arises as to whether *all* or *any* foreign corporation can assess stock as required by that section, so as to avail itself of the deductions allowed by that section.

As a premise to any proper conclusion, certain well settled principles of law must be assumed:

First: As to assessment of capital stock in domestic corporations, the power of the State *creating* that corporation includes the right to tax the stock of that corporation, wherever its shareholders reside.

Justice Holmes in Hawley v. Malden, 232 U. S., p. 12, says:

> "Undoubtedly, the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares whether owned by residents or non-residents. Corry v Baltimore, 196 U. S. 466. This is by virtue of the authority of the creating State to determine the bases of organization and the liabilities of shareholders."

Probably the strongest statement as to the right of a State to tax its own corporations is contained in the opinion in Cream of Wheat Co. v. Grand Forks County, N. D., 253 U. S. 325, 40 Sup. Ct. Reporter, p. 558. Mr. Justice Brandeis lays down this principle:

> "The company was confessedly domiciled in North Dakota, for it was incorporated under the laws of that State. As said by Mr. Chief Justice Toney, 'it must dwell in the place of its creation, and cannot migrate to another sovereignty.' Bank of Augusta v. Earle, 13, Pet. 519, 588, 10 L. Ed., 274. The fact that its property and business were entirely in another State did not make it any the less subject to taxation in the State of its domicile. The limitation imposed by the Fourteenth Amendment is merely that a State may not tax a resident for property which has acquired a permanent situs beyond its boundaries."

Second: As to assessment of shares of stock in foreign corporations, owned by residents of a particular State, the

State's power to tax such stock is based on the principle that the situs of stock for taxation is the domicile of the owner of such stock.

37 Cyc., p. 864:

> "Each State has the right and power to tax its own resident citizens on shares of stock in foreign corporations owned and held by them, the stock having its *situs* at the place of the owner's domicile; and this right is not affected by the fact that the stockholder may have been taxed upon the same stock in another State."

It seems to follow conclusively, from the above well settled principles, that, if the assessment of capital stock is against the several shareholders, rather than against the corporation itself, the power of the State to tax stock in foreign corporations, *under such a scheme of taxation,* is restricted to *resident owners* of such stock. Section 12 of the Revenue Law of 1919, which in broad language may be considered applicagle to both foreign and domestic corporations, cannot, under any practical construction, apply to foreign corporations. It could not, even under a strained construction, apply to any foreign corporation, except one which had qualified to do business in Alabama. Under *any* construction, therefore, of this section all *other* foreign corporations are excluded from the provisions and benefits of this section. Did the Legislature, by Section 12, intend to confer certain benefits on certain classes of foreign corporations, or was this section merely a complement of subdivision "i," Section 5, of the same law, which expressly levies a tax on shares of stock in foreign corporations?

Subdivision "i" expressly taxes shares of stock in foreign corporations. There is no provision elsewhere in this same law which taxes stock in domestic corporations, except Section 12. Giving both provisions of the same law a field for operation, isn't it reasonable to conclude that the Legislature intended one provision to apply only to *foreign corporations* and the other provision to apply only to *domestic corporations?* Or, is it reasonable, as able attorneys have argued, that the Legislature intended that Section 12 should apply to *all domestic corporations* and to *some foreign corporations?* We submit that the Legislature ought not to

be convicted of this inconsistency merely by the inapt use of language. The use of the words "any corporation" in Section 12, should, we think, be construed in consonance with the spirit and purpose of the Revenue Law as a whole. Thus construed, we think the conclusion unavoidable that two separate schemes of taxation have been provided for taxation of capital stock, assessable against the shareholders: (1) The assessment against stockholders in domestic corporations, under Section 12 of the Revenue Law of 1919; (2) an assessment against resident owners of shares of stock in foreign corporations, under Section 5 of the Revenue Law of 1919.

This opinion has been unduly extended because of the strenuous insistence of able attorneys that Section 12 could, at the option of certain kinds of foreign corporations, be made applicable to them, so that this particular class of foreign corporations could avail itself of the deductions allowed by this section. Many illustrations could be given showing the absurdity of this contention. We content ourselves for the present with the mere statement that this section is *mandatory* in its provisions; and if construed as applicable to *any* foreign corporation, the entire section is unconstitutional and void. Assuming, as we must, that the Legislature intended to pass a constitutional law, our duty is to conclude that the Legislature did the *reasonable* and *constitutional* thing. That conclusion being so well supported by law and common sense, we advise you that Section 12 of the Revenue Law of 1919 applies only to domestic corporations; and that assessment of shares of stock in foreign corporations must be made under subdivision "i," Section 5, of the revenue law of 1919.

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

STATE BANKS:—On expiration of charter renewal may be made for not longer than twenty years.

Hon. H. H. Montgomery, April 9, 1921.
State Superintendent of Banks,
Capitol.

Dear Sir:

You submit the following inquiry, to-wit:

"Where the charter of a bank incorporated under the laws of Alabama will soon expire may such charter be extended perpetually, or should such extension be limited to a period of twenty years?"

Section 251 of the Constitution of 1901, which is virtually a copy of Section 18 of Article XIV of the Constitution of 1875, reads as follows:

"Every bank or banking company shall be required to cease all banking operations within twenty years (b) from the time of its organization, unless the time be extended by law, and promptly thereafter close its business; but after it has closed its business, it shall have corporate capacity to sue and shall be liable to suits until its affairs and liabilities are fully closed."

This section, though of many years standing, has never been directly construed by the Supreme Court of the State. The State Constitution, however, is a limitation upon legislative power, and this section must be construed as prohibiting the chartering of a banking corporation for a longer period than twenty years.

Ensley Development Co. v. Powell, 147 Ala. 300; 40 South 137.

Meyer v. Green, Probate Judge, 154 Ala. 248; 45 South 587.

The section when included in the Constitution of 1875 was intended, doubtless, to prevent vesting by charter a perpetual right with which future Legislatures would be powerless to interfere regardless of how inimical to the public interest experience might prove the right to be.

To permit an extension of a charter for a perpetual period would violate this intention of the section as flagrantly as permitting the right to be given in the charter when first incorporated.

The section perhaps had for its purpose also a readjustment of the assets of the bank, a rule followed by the National Banking system and several state banking systems.

In my opinion the only safe course for your Department to pursue is to approve only those charters or extensions of

charters which are limited to a period of twenty years duration.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

DENTAL HYGIENIST:—Cannot practice independently of licensed dentist or institution.

April 12, 1921.

Dr. H. Clay Hassell,
Secretary-Treasurer Board of
Dental Examiners of Alabama,
Tuscaloosa, Ala.

Dear Sir:

The Attorney General has referred to me your letter of March 17, making certain inquiries as to the provisions of the Act "To define dentistry," etc. (Acts 1915, p. 326, as amended by Act of 1919, p. 784.)

You ask if a dental hygienist would have the right or authority to practice except in the office of a licensed dentist and directly under his control and supervision, or in a public institution, school or hospital under the general direction of a licensed dentist; and, if not, could the mere fact that such dental hygienist has a joint reception room with a dentist but is not working for him, be construed as putting her under the dentist.

Section 1 of the Act provides that a dental hygienist is any one who shall clean and polish teeth, and such work is also included in the work of a dentist. No one is allowed under the provisions of the Act to do dental work without taking the examination, obtaining a certificate, and being registered except certain classes named in said Section 1 of the Act, viz.: dental hygienists *employed* by a licensed dentist or a public institution, school or hospital under the general direction of a licensed dentist, persons working in a dental laboratory, students in a dental school or college, or working under a preceptor during a college vacation.

No one except those above named and working under the conditions above set forth can practice as a dental hygienist in this State, and if such hygienist be not employed in one of the ways mentioned she is without authority to practice.

The fact that such person may use a reception room jointly with a licensed dentist, or even work in the same office with a licensed dentist, unless *employed by him,* would not confer the right to engage in the work of a dental hygienist. Such dental hygienest may, however, work in the employ of a dentist and work in a separate room or office.

Section 29 of the Act contains certain provisions concerning dental hygienists. This section is, however, in my opinion, unconstitutional and void for the reason that it is a section added to the original law, and the twenty-eight sections to which it is added are not set out in the 1919 Act by which this Section 29 is added. Under the Constitution of this State if a statute is to be amended by adding one or more sections, the entire law to which such addition is to be made, must be set out at length in order to render valid such added section or sections.

Ferguson v. Commissioners Court of Jackson Co., 187 Ala. 645; 65 So. 1028.

However, Section 15 of the Act confers upon the Board the power and authority "to adopt such rules, by-laws and regulations, *not inconsistent with the laws of this State,* as may be necessary for the regulation of its proceedings, and for the discharge of the duties imposed upon it." I am of the opinion that the Board could adopt a rule in the language of said Section 29 which would be binding as such a rule would not appear to be inconsistent with the present law.

If the Board should adopt a regulation which would require a hygienist to use her certificate only in the office of and under the supervision of a licensed dentist, or in a public institution, school or hospital under the general supervision of a licensed dentist, I do not think it would be of any force or value for the reason that the *law itself prohibits* the use of such certificate except under such conditions. Under the law, such persons, and such persons *only* and under such conditions *only*, may operate as dental hygienists in Alabama, and it is unnecessary for the Board to provide that such persons *may* not operate under other conditions as the law itself so provides. The Board might lawfully adopt a rule if it should see fit to do so, and I assume it does not wish to do so, to the effect that persons could practice as dental hygienists for their own account

provided they shall be in the office attached to the office of a dentist, or in the office of a dentist; in other words, the Board might broaden the privilege now conferred by the statute upon those employed by a dentist, but it is altogether unnecessary to provide for a rule that persons shall not practice unless employed by a dentist, etc., for, as above stated, no right is conferred by the Act to practice by any one unless he or she be in the *employ* of a dentist, etc.; and such rule would amount to no more than a duplication of the statute.

You ask if the Board has authority to issue a certificate as provided in Section 21 at any other time than when in regular session, construing said Section 21 in connection with Section 6 of the Act. As I understand these two sections, it is the purpose of Section 21 to provide for the issuance of a *permanent* certificate to dentists coming to Alabama from other States to locate here, such certificate to be issued at a *regular meeting* of the Board; and the purpose of Section 6 is to provide for the issuance of a *temporary* certificate at any time to be effective between the time of making application for a certificate and the time of the next regular meeting of the Board of Dental Examiners.

So far as the oath provided for members of the Board under Section 13 is concerned, this section merely provides "that it shall be the duty of each member of said board, after his election or appointment, and before entering upon the discharge of the duties of his office, to file with the secretary-treasurer of the board an oath," etc. This is a mere "duty" and the validity of his acts are not conditioned upon the previous filing of the oath, and such acts would be valid in the absence of the oath, so long as not questioned by proceedings to oust him, and such acts would be binding on all parties.

Throop on Public Officers, Sections 173, 174, 629, 630.
Thompson v. Holt, 52 Ala. 491.
State v. Tucker, 54 Ala. 205.
Beebe v. Robinson, 52 Ala. 66.

He should, however, file the oath without further delay.

With reference to your inquiry about the use of the Law Enforcement officers, will say that this office has no juris-

diction or authority over them, they being, under the law, subject only to the orders of the Governor.

This letter is not to be construed as in any way affecting persons employed by the State, on which subject I recently rendered an opinion to Dr. H. T. McKinnon, President of the Association.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

BUILDING AND LOAN ASSOCIATIONS:—If stock is speculative securities, must conform to Blue Sky Law.

State Securities Commission,
Capitol.

Dear Sirs:

Your letter of April 2nd by Hon. Wm. C. Oates, Executive Officer of the State Securities Commission, has been received. The same has been referred to me by the Attorney General with request that I furnish you an opinion upon the question contained in your letter.

Your request an opinion on the following question:

> "Does the stock of building and loan associations come within the purview of the Alabama Securities Act, House Bill No. 14, Special Session 1920, commonly known as Blue Sky law (Acts 1920, page 60), whether such stock is that of foreign building and loan associations, domestic building and loan associations already organized, operating and doing business in this State, or that of newly organized domestic building and loan associations?"

Whether any such stock comes within said Act must be determined and can only be determined by ascertaining whether it is a "speculative security" as the same is defined by the Act itself. It is, therefore, rather a question of fact than one of law.

This Act does not undertake to say to what particular business or class of businesses the Act shall apply. The provisions of the Act are made specifically to apply to any business which issues speculative securities, as the same are defined by the Act.

Section 9 of the Act provides expressly that the provisions of the Act shall not apply to certain securities, or to certain businesses. It is worthy of not that building and loan associations are named in said Section 9, but it is there stated that they are exempted when authorized by the State Securities Commission to do business in this State.

If any building and loan association undertakes to sell or offer for sale in this State any of its stock without having first been authorized by the State Securities Commission to do business in this State, such association will be liable, and every person participating in the selling of its stock will be liable to the penalty provided in this Act, if its stock should be found to be speculative securities as defined in the Act.

If any building and loan association is first authorized by the State Securities Commission to do business in this State, then the provisions of said Act will not apply to it, as provided under Section 9 of the Act.. But if any building and loan association fails or refuses to obtain such authority, then the question as to whether the provisions of the Act apply to it must be determined as it would be determined under the Act in the case of any other business not expressly exempt from the provisions of the Act.

The above opinion applies in the case of foreign building and loan associations, domestic building and loan associations already organized, operating and doing business in this State, and to newly organized domestic building and loan associations.

Very truly yours,

HUGH WHITE,

Assistant Attorney General.

FERTILIZER DEALER'S LICENSE:—Brokers handling on commission for interstate shippers required to pay license tax.

Hon. M. C. Allgood, April 14, 1921.
Commissioner of Agriculture,
Montgomery, Alabama.

Dear Sir:

Your letter of March 3rd addressed to the Attorney General has been referred to me by him. You request an

opinion upon the question whether a broker who resides in this state and handles fertilizer on commission for interstate shippers is liable for fertilizer license under Section 2 of the Act of the Legislature approved August 14, 1907, found on page 30 of your fertilizer bulletin issued for August, 1920.

This Act of the Legislature is a statute regulating the sale of fertilizers, as well as the registration, branding, sale, tagging and analysis thereof in the State of Alabama. The statute is a police regulation and has been held to apply even where the seller is a resident of another state.

2 Corpus Juris, page 1000.
Steiner & Sons v. Ray et als., 84 Ala. 93.

Our Supreme Court has held that such a statute applies where a sale of fertilizer is made for this state although the seller is a resident of another state and the fertilizer is to be brought from other states, and that being a police regulation it is not in conflict with the clause of the Constitution of the United States which vests sold power in Congress to regulate the commerce between the states.

Brown & Co. v. Adair et als., 104 Ala. 652.

Reasonable police regulations of a state do not constitute interference with interstate commerce, though incidentally affecting that commerce.

McDonald v. State, 81 Ala. 279.

Foreign corporations as well as individuals, are required to comply with the laws of this state as to obtaining a license to sell fertilizers and as to tagging them, whether the act of sale happens to be an interstate or an intrastate transaction.

Padgett v. Gulf Port Fertilizer Company, 11 Ala. Appeals 381.

The confusion which usually arises in the mind of the layman as to his liability to obtain a so-called license or permit when an interstate transaction is in any way involved, is generally due to the fact that he fails to distinguish between a law which requires a license for the

privilege of carrying on a particular occupation and which is enacted for the purpose of raising revenue; and a law which is enacted as a police regulation for the safety or protection of the people and which requires persons engaging in business that comes within such police regulation to obtain a permit to engage in such business. It is true that commercial brokers doing business in this state who represent non-resident principals exclusively, are not liable for a license tax where such tax is a privilege license upon the occupation and enacted to arise revenue and is not a police regulation.

Stratford v. City Council of Montgomery, 110 Ala. 619.

The distinction between statutes enacted to raise revenue only, and those enacted to prescribe a police regulation has been made clear by our court.

Sunflower Lumber Co. v. Turner Supply Co., 158 Ala. 191.

The mere fact that a fee is charged under said Section 2 of the said Act, approved August 14, 1907, for the issuance of the permit, is not determinative of the question as to whether the statute is one to raise revenue or constitutes a police regulation. The determination of this question must be based upon the nature and purpose of the Act, and such Acts as the one in question, have been uniformly held by our Supreme Court to constitute a police regulation.

State v. Parker, 5 Ala. App. 240.

My opinion, therefore, is that brokers who reside in this State and handle fertilizers on commission for interstate shippers come within said Section 2 of said Act and are required to procure the license therein named.

Yours very truly,

HUGH WHITE,

Assistant Attorney General.

OFFICE HOLDERS—Effect of Federal census on salaries fixed by population of county; also effect on establishment of county courts dependent on population.

April 14, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your inquiries as to the effect of the federal census of 1920 on the following Acts have been received:

First: The Act providing for the election of county solicitors in all counties having a population of not less than 18,125 and not more than 18,900, according to the federal census of 1910, or any subsequent census. The Act at the time of its passage applied only to Baldwin, Choctaw and Escambia counties. (Acts 1919, page 831.)

Second: The Act re-establishing the county courts in all counties wherein the same have heretofore been abolished, except in counties having a population of 50,000 or more according to the last preceding federal census. (Acts 1915, page 862.)

The first case presents as to the facts an anomalous situation. As above shown, the Act originally applied only to three counties in the extreme southern part of the State. On account of the increase in population shown by the census of 1920, these three counties have passed the maximum fixed by the Act of 1919, but two adjoining counties in the extreme northern part of the State (Fayette and Lamar) have by an increase in their population stepped into the shoes of the three southern counties. Thus, this law, if effective at all, first gave birth to triplets in South Alabama and then, committing infanticide, destroyed the triplets, but, making amends for this offense, immediately condoned the crime by creating twins in North Alabama. This may raise a controversy between the two ends of the State as to whether a fair bargain has been made, by swapping three counties for two. Any opinion as to the merits of this possible controversy will certainly offend one section or the other. So, we content ourselves with simply a statement of the facts as they exist.

The only legal question involved in the first case, outside of the doubtful validity of the law as *originally passed*

(Reynolds v. Collier, 85 So. 465), is, when did the Census of 1920 become effective?

If the federal census law itself fixes the date when the census taken under it becomes effective, that date so fixed determines the inquiry. The federal statute, however, fails to fix that particular date, except by inference from the powers conferred on the director of census.

5 U. S. Comp. Stat., Sections 4389, 4390, 4391, 4392, 4403, 4414, 4420, 4420a to 4434d (inclusive).
1919 Supplement Comp. Stat., Sections 4388a to 4388n (inclusive).

Without attempting to analyze the various sections of the census law, as amended, it is sufficient to say that the law, without fixing the date when the census results becomes effective, does authorize the director of census to issue bulletins and make preliminary announcements of the results reached by the enumeration already made. Any announcement made by the director of census, whether technically taken as a *preliminary* or *final* announcement, is itself an *official* announcement of which courts must take cognizance.

In Childers v. Duvall, 69 Ark. 336, the precise question here presented was raised. The question in that case is so well stated by Justice Battle that we quote his language:

> "Upon the supposition that Lawrence County, in this state, contained over 15,000 inhabitants, the Democratic party in March, 1900, held a primary election, and nominated T. M. Duvall for county clerk, and C. C. Childers for circuit clerk of that county. In June, 1900, the federal census of Lawrence county was taken by the enumerators appointed for that purpose. On the 3rd day of September, 1900, at a general election held on that day, C. C. Childers was elected circuit clerk, and T. M. Duvall, county clerk, of said county. On the 3rd day of October, 1900, the director of the census published a bulletin in which he stated that the population of Lawrence county, according to the federal census of 1900, exceeded 15,000 inhabitants. On the 31st day of October, 1900, the Governor of this State appointed Duvall clerk of the county and probate courts of that county to fill a vacancy occasioned by

the last federal census showing that the inhabitants of that county exceeded 15,000. Duvall qualified and entered upon the discharge of the duties of the office. The question is, who is the county clerk of Lawrence County?"

The court in passing on this question says:

"According to this synopsis of the Act of March 3, 1899, it appears that the reports of the work of all persons taking the enumeration of the inhabitants of the United States were to be made to the director of the census, and were subject to his approval, and that *he alone was authorized to make known the result.* (Italics ours.) He was authorized to do so by printing, publishing and distributing *bulletins* and *reports*, or by furnishing a Governor or chief officer of any municipal government, at his request and expense, copies of parts of the population returns. (Italics ours.) It is only by means of the printing, publishing and distributing of the *bulletins* and *reports* that he is authorized to give the information to the public before the *publication of the entire census of the population of the United States in the form of volumes,* which are required to be published. * * *

"On the 3rd day of October, 1900, the director of the census, *by the publication of a bulletin,* made known that the population of Lawrence County exceeded 15,000. This was the first time it was lawfully made known, and official notice could have been taken of the fact; and soon after this the Governor of the State filled the office of clerk of the county court of that county by appointing T. M. Duvall county clerk. The appointment was lawfully made."

The law under which the census of 1900 was taken (which is construed in the Childers' case, supra), is substantially the case as the present census law, so far as it relates to the authority and duty of the director of census in making an announcement of results. The substance of the holding in this case is that any announcement made by the director of the census, authorized by law to be made by him, whether by issuance of bulletins, or otherwise, is an *official an-*

nouncement of which official notice can be taken by state authorities.

Wolf v. City of Moorhead, 98 Minn. 113, construes a state statute under which a state census was taken. The only question in this case was whether the census went into effect on the date fixed for the completion of the enumeration, or upon the declaration of the result by the superintendent.

Justice Jaggard says:

> "That enumeration did not constitute the census in law; on the contrary, it was but a step in its creation. The census went into legal effect upon its compilation and publication by the superintendent. Section 18. Until that time, the various municipal corporations of the state were governed by the laws applicable to cities of the class determined by the previous census."

See also:

Greenough v. Narragansett, 29 R. I. 380, 11 C. J., p. 70 et seq.

We find no federal decisions on this particular point. The reasoning of the above cited cases and a common sense construction of the census law force us to the conclusion that the date of the first preliminary announcement by the director of the census, being itself an *official* announcement, authorized by the law, is the date when the census of 1920 becomes effective as to any particular county in this state. The fact that an announcement may be made on different dates as to the several counties of the state cannot affect the reasonableness of the rule above announced. There is no requirement in the census law that the enumeration made shall be considered as an *entity*, and that no announcement of the result of the enumeration is final until the *entire* enumeration is ascertained. This construction, we think, would be contrary to the express provision of the statute authorizing announcements of results in particular localities.

In the other case presented, as to the re-establishment of county courts in all counties of the state, except those having a population of 50,000, or more, according to the last federal census (Acts 1915, page 862), a different question is presented.

At the time of the passage of this Act, Madison County had a population of less than 50,000. The county court was, therefore, re-created in this county. In August, 1920, a perliminary announcement was made by the Census Bureau showing that the population of Madison County exceeded 50,000. The question here is: Is the county court of Madison disestablished or discontiued by the fact that the population of that county now exceeds 50,000? The population of Madison County under the 1920 census becomes officially effective on the date of the preliminary announcement. But, assuming that to be true, does this change in population affect the existing county court in Madison county?

We think not. The legislature of 1915 had the right to re-create county courts and to make a reasonable classification, on the *then* existing population, as to the counties to which this Act should apply. That legislature had the right, broadly speaking, to re-establish county courts in all counties of the State having *at that time* a population of less than 50,000. The legislature, in the exercise of its undoubted right, restricted the classification of counties on a population basis to the "last preceding federal census," without any variable adjustment as to subsequent censuses. If the classification, *as originally made,* is a reasonable one, and we think it is, then, we cannot properly insert in the law a provision, omitted by the legislature, that the population basis, restricted by the Act itself to the *"last preceding* federal census," applies also to any *subsequent federal census.*

The Act itself, re-creating the county courts, does not provide for a discontinuance of that court when any county has exceeded 50,000 population. We are not justified in reading into the Act, by inference merely, a provision which the legislature has presumably purposed to omit.

Our conclusion in that the county court of Madison County is not affected by the result of the 1920 census.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

LICENSE INSPECTOR:—Defrays his own expenses.

April 15, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Section 366 of the Revenue Act of 1919 (Acts 1919, p. 442), provides that the State Tax Commission is authorized to appoint a license inspector for each county, or more than one county, if it deems expedient. No provision is made for the furnishing of such license inspector with stationery by either the State or a county.

Such license inspector is compensated by being paid a per cent of the amount of delinquent licenses collected. The law requires the license inspector to defray his own expenses, whether it is stationery or expenses of other character.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

ELECTIONS:—In absence of showing of fraud, failure to canvass votes within time required by law will not invalidate election.

April 15, 1921.

Hon. Jno. W. Abercrombie,
State Superintendent of Education,
Capitol.

Dear Sir:

A letter from the Hon. J. E. Kumpe, Probate Judge of Lawrence County, states the following facts on which he wishes to be advised.

In September, 1919, an election was held in some of the districts of the county for the purpose of levying a special school tax. A large majority voted in favor of levying the tax, but the returns of such election were not canvassed within the time required by law. The returns, however, were canvassed at a later date and the results published. Does this irregularity invalidate the levy?

Statutory provisions regulating the time within which a canvass of the vote is to be made should be strictly fol-

lowed. However, not every failure to technically comply with such provisions will invalidate the election. In the absence of any showing of fraud, the failure to canvass votes within the time required by law, will not invalidate such election.

20 Corpus Juris, 191, Sec. 239.
Patton v. Watkins, 131 Ala. 387; 31 So. 93.
Mizell v. State, 173 Ala. 434; 55 So. 884.

It is my opinion that if the canvass was fairly made without intervention of any fraud, the failure to make such canvass within the time required by the statute does not invalidate the election.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COSTS:—In appeals from municipal court to circuit court, circuit solicitor not required to prosecute and solicitor's fee not incurred. No provision for payment of costs in case of acquittal on such appeal. Fines for violation of city ordinance are paid into city treasury.

April 16, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of March 8th addressed to the Attorney General has been received. The request for the opinion of the Attorney General contained in the letter has been referred to me by him with directions that I advise you upon the matters therein inquired about. Your letter contains the following inquiries which are numbered by me for the sake of convenience, namely:

(1) "Where a defendant is convicted in a recorder's court or a municipal court of any kind and appeals direct to the circuit court, is it required of the circuit solicitor to prosecute in the latter court?

(2) "If the defendant is convicted in the latter court, are two solicitors' fees chargeable under Section

7, page 822, Acts 1915, and settled as prescribed by said section?

(3) "If, in such a case, there is an acquittal on appeal in the circuit court, are the costs in the case chargeable to the municipality or to the fine and for-forfeiture fund of the county?

(4) "If there is a conviction and a fine assessed does the fine go to the county or to the municipality?"

In response I beg to advise you as follows:

(1) Where a defendant is convicted in a recorder's court or a municipal court, for the violation of an ordinance of the town or city, and an appeal is taken from the judgment of conviction to the circuit court, it is not required of the circuit solicitor to prosecute such cause in the circuit court.

The violation of a city ordinance is not an offense against the laws of the State. As early as 1848 the distinction between offenses against a municipal corporation and those against the State was made by our Supreme Court. An offense against the municipal corporation is one which is against the peace and good order of the city; and an offense against the State has a more enlarged object in view, the maintenance of the peace and dignity of the State. Many things are made offenses against the peace and order of the city which do not constitute offenses against the State. The mere fact that a city has ordained that some acts shall constitute offenses against the city which are also offenses against the State, does not affect the fact or the principle that offenses against the city and those against the State are to be distinguished for the reasons above stated.

Mayor and Aldermen v. Allaire, 14 Ala. 403.
Mayor et al. v. Fitzpatrick, 133 Ala. 616.
Little v. City of Attalla, 4 Ala. App. 291.
Rosenberg v. City of Selma, 168 Ala., 197.

The circuit solicitor is an officer of the State. His office is created by the Constitution. His duties are prescribed by law and are enumerated in Section 7781 of the Code of Alabama of 1907. No basis can be found in this section for an obligation upon his part to prosecute the violation of city ordinances upon appeal in circuit court unless it can

be found in sub-paragraph of said Section 7781 in which it is made a part of his duties to prosecute all "indictable offences." It is clear, I think, that indictable offenses cannot be construed to cover offenses against the city. Even though the act which constitutes an offense against the city would also constitute an offense against the State, in the particular prosecution by the city the offender is being prosecuted not for an act against the State, but for an act against the peace and order of the city. In no event is it the duty of the circuit solicitor to prosecute the violation of a city ordinance under our present laws.

(2) In answer to your second question I beg to advise that the cases above cited and the reasoning contained in them are sufficient to advise you that solicitors' fees could not be charged for the prosecution of the violation of city ordinances unless there was some law providing that such fees should be charged in these cases. I have not been able to find any law authorizing solicitor's fees to be charged in cases of such prosecutions.

Solicitors' fees are costs and costs are penal and are not allowed except where expressly authorized by statute.

City Council v. Foster, 54 Ala. 62.

There is another reason why solicitors' fees would not be collectible under said Section 7, page 822, Acts of 1915. The fees which may be taxed and collected under said Section 7 are where there is a conviction of a misdemeanor. A misdemeanor has been defined by statute in our State as being a public offense of lower grade than a felony. Section 6756, Code of 1907. The violation of a city ordinance is not a public offense within the meaning of such term as used in said Section 6756.

32 Cyc. 1249; State v. Lee, 29 Minn. 445.

(3) In answer to your 3rd question I beg to advise you that in such a case where there is an acquittal on appeal in the circuit court, the costs, of course, cannot be charged to the municipality. As stated above and as held in the case of City Council of Montgomery v. Foster, 54 Ala. 62 costs are penal and cannot be taxed or allowed except where expressly authorized by statute. I have not been able to

find any statute authorizing such costs to be taxed against a municipality.

City of Selma v. Stewart, 67 Ala. 338.

Further answering your third question, it is my opinion that in the case stated, the costs cannot be charged against the fine and forfeiture fund of the county. Such costs could not be charged against this fund unless there is some provision of law authorizing this to be done. I have not been able to find any such provision. Section 6636 of the Code of 1907 provides that in all trials in the circuit court, etc., where the State fails to convict or the indictment abates, or is *nolle prossed* or withdrawn, the fees of the sheriff and the clerks of the court shall be paid out of the fine and forfeiture fund. You will note, however, that this provision applies only where the State fails to convict and hence would not apply to a case where a city has failed to convict because the provisions of said Section 6636 plainly apply only in cases of offenses against the State.

(4) In answer to your fourth question, I beg to refer you to Section 1218 of the Code of 1907, which provides that where a defendant has been convicted for the violation of a city ordinance upon appeal in the circuit court and makes payment of the fine, while the clerk of the circuit court is authorized to receive such fine and costs, he is also required under a penalty to pay said money to the treasurer of the city within thirty days after he receives it.

Section 1219 of the Code of 1907 does provide that the circuit court may sentence a defendant who has been convicted in such cases to work out costs incurred in the circuit court. This provision, however, in my opinion is not sufficient to authorize the taxation of solicitors' fees in such cases. When this Section 1219 is considered in connection with all of the other statutes which relate to this subject, I think it is plain that the term "costs" incurred in said circuit court cannot be held to include any other costs except those costs of such court, which are provided for by statute and which do not include solicitors' fees.

The opinion above set out is given as applying only in cases which are violations of city or town ordinances. Recorders and mayors acting as recorders, in addition to

having jurisdiction to try cases which involve the violation of by-laws and ordinances of the city, also have original and concurrent jurisdiction with the county court or court of like jurisdiction of all misdemeanors committed within the city or town or within the police jurisdiction thereof.

Section 1221 of the Code of 1907.

Where a recorder or mayor exercises this latter jurisdiction, the case should be docketed by him as all state cases are docketed, that is as the State of Alabama v. John Doe. If the defendant who is tried by the recorder or mayor for the violation of a state law, takes an appeal to the circuit court, it would of course be the duty of the circuit solicitor to prosecute such case upon the appeal. Applying your second question above set out to the appeal of a state case from such recorder or mayor sitting with the jurisdiction of a county court, it is my opinion that a solicitor's fee in the circuit court would be chargeable. I do not think a solicitor's fee would be chargeable, however, as a part of the costs in the recorder's court, unless there is a provison of law authorizing or directing the solicitor or some deputy solicitor or county solicitor to prosecute such cases before the recorder or mayor. I think the provisions of Section 7, page 822, Acts of 1915, apply to such inferior courts in which it is made the duty of some solicitor to appear and prosecute in behalf of the State.

As above stated, costs are not allowed except where expressly authorized by law, and I do not think it is permissible to charge a solicitor's fee in an inferior court, unless there is some provision of law which requires or directs a solicitor to prosecute the cause in such inferior court.

Under Section 4, page 819, Acts of 1915, it becomes the duty of the deputy solicitor to represent the State in a Recorder's Court when it is exercising its jurisdiction that is concurrent with that of county courts in trying State cases, and hence the two solicitors' fees provided for under said Section 7, page 822, Acts of 1915, would in such cases be chargeable.

If a State case is appealed from the recorder's judgment of conviction and the defendant is acquitted in the circuit court, the costs in such case would be chargeable to the fine for forfeiture fund of the county. In such a case if

there is a conviction, and a fine assessed, the fine would go to the county and not to the municipality.

Very truly yours,
HUGH WHITE,
Assistant Attorney General.

NATIONAL GUARD:—Appropriation may cover interest on moneys borrowed during emergency, if a necessary expense, which is question of fact.

April 18, 1921.

Col. Hartley A. Moon,
Adjutant General,
Capitol.

My dear Sir:

In your letter of April 1st you state the following facts:

> "For the purpose of obtaining a cash fund sufficient to finance troop operations in the strike district during the recent emergency, the Commanding General, Birmingham Area, on frequent occasions borrowed money from a Birmingham Bank. For these transactions he gave his note, which was paid at some subsequent date when the money had been disbursed, receipts therefor obtained, the accounts vouchered and the money obtained from the State Treasurer."

You request to be advised whether items of interest on these loans are a proper charge against the special military appropriation.

The Act of 1920, approved October 5, 1920, contains the following provision:

> "That in addition to the monies already appropriated by this section, there is appropriated out of monies, not otherwise appropriated, such sum as may be necessary for pay, subsistence, shelter, travel and other necessary expenses of troops, called into the active military service of the State for the purpose of enforcing the law, preservation of peace, for the security of lives of citizens, for relief and aid in the case of disaster and for the protection of property. The dis-

bursement of all funds appropriated by this shall be with the approval of the Governor."
Acts Special Session 1920, page 107.

Under this provision interest might be payable if it was a necessary expense of the troops called into active military service of the State for the purpose of enforcing law. Whether or not it is a *necessary* expense is a question of fact, which must be determined by the Governor from the circumstances surrounding each separate transaction.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

DEPUTY SOLICITOR OF LAMAR COUNTY:—Local law superseded by general law.

April 20, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

A local law was passed at the 1903 Session of the Legislature, fixing and regulating the fees of the deputy solictor of Lamar County..

Local Acts Alabama, 1903, page 464.

This Act provides that the deputy solictor of Lamar County shall receive all fees for convictions in the county court, and for convictions in the circuit court, where the defendant has appealed from the county court to the circuit court, and in all cases where the defendant demands a jury in the county court and his case is thereby removed to the circuit court and he is convicted in the latter court.

You ask (1) whether the law as originally passed is constitutional and (2) whether it has been repealed by subsequent legislation.

Under our view of the case, it is not necessary to pass on the constitutionality of this act.

The Legislature of 1915 passed a general law, entitled "An Act, To provide for the election of a solicitor for each judicial circuit in the state; to fix his compensation; au-

thorize the appointment or election of deputy solicitors and assistant solicitors, prescribe their duties and authority, and fix their compensation." (Acts 1915, page 817.)

This Act, general in its nature, is a complete revision of the subject embraced within the broad title thereof above quoted.

Section 4 of this act authorizes the several circuit solicitors (with some exceptions not applicable to this case,) to appoint a deputy solicitor in each county of his circuit to represent the State in all cases in the county court and inferior courts and all preliminary proceedings, etc. Such deputy solicitor is removable at the pleasure of the circuit solicitor.

Section 5 graduates the salaries of deputy solicitors according to the population of the counties wherein they serve and require such salaries to be paid out of the county treasury.

Section 7 provides that the solicitor's fees for convictions in the county court or on appeal to the circuit court shall be taxed as a part of the costs, in addition to the solicitor's fee taxed for conviction in the circuit court; and this solicitor's fee, previously taxed in the county court or inferior court, shall be *paid,* when collected, *into the county treasury.*

Section 10 provides that, "All general, local or special laws establishing the office of county solicitor or the office of solicitor of any court by whatsoever name called, except circuit solicitors, and all general, local or special laws in conflict with any of the provisions of this act are hereby expressly repealed; and all provisions of such local act or acts, as well as all the provisions of all other local or special acts applicable to such county solicitor or solicitors of any court in such county, which are not in conflict herewith, are hereby made applicable in all things to the circuit solicitor of the county where such local acts apply just as fully and to the same extent as they now apply to such county solicitor or the solicitor of any court in such county."

Considering the act as a whole it is the evident intention of Section 10 of this act to repeal all local acts except so far as the act itself expressly continues them in operation. The special exceptions shown by this act can apply only to Mobile, Montgomery, and Jefferson Counties. As to all other counties, the act in its entirety applies and, by neces-

sary implication, repeals *all* local laws relating to *other* counties.

In Foshee vs. State, 72 Sou. 685, Judge Pelham uses this language:

> "The Act of 1915 contains a repealing clause (Section 22, page 553), and was manifestly intended by the Legislature to restate and cover the entire subject of registration and licensing of automobiles, and repeals the provisions of the former statute (1911) relating to that subject." (Citing several Alabama decisions.)

The act construed by Judge Pelham is parallel in principle with the act now under consideration. Both purport to "restate and cover the entire subject." Both have repealing clauses emphasizing this legislative intent.

Without deciding, therefore, whether the local law for Lamar County, as originally passed, was constitutional, we do hold that that local law was repealed by the Act of 1915.

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

COUNTY SUPERINTENDENT OF EDUCATION:—May be required by State Board to hold certificate of administration and supervision.

April 22, 1921.

Hon. John W. Abercrombie,
State Superintendent,
Capitol.

My dear Sir:

Your request of the 18th instant for the opinion of the Attorney General upon the matters therein inquired about has been received, and referred to me by the Attorney General with direction that I furnish you the opiinon asked for. Your request is for an opinion in response to the following inquiry contained in your letter of the 18th instant, namely:

> "Will you please advise me whether the State Board of Education is empowered to require the holding of

> such certificate of administration and supervision (as that provided for on pages 8 and 9 of rules and regulations governing the examination and certification of teachers, your bulletin number 32) by the county superintendent as a prerequisite to employment by the county board of education as provided in Section 1 Article 6 of the School Code?"

In response to this inquiry I beg to advise you as follows:

It is plain that it is the purpose of our law as set out in the Acts of 1919, in what is commonly called the School Code, that the State Board of Education shall exercise through the State Superintendent of Education, and his professional assistants, general control and supervision over the schools of the State.

Section 4, Article 3, Acts of 1919, page 571.

Under the provision of Section 1, Article 6, Acts 1919, page 588, it is provided as follows:

> "No person except a present incumbent shall be appointed to the office of county superintendent of education after the passage of this act who is not a graduate of a standard normal school, or who has not completed courses in other institutions that, in the opinion of the State Board of Education, are equivalent to such education or who does not hold a 1st grade or life certificate, and in addition thereto has had at least three years of successful teaching experience."

It is plain that the standard of qualification set out in this provision last quoted is a minimum standard of qualification. Any person who may be appointed to the office of county superintendent of education, except a present incumbent, must have at least the qualifications here set out. Neither the State Board of Education nor any county board of education has the power to provide that a person having less or lower qualifications than those here set out could be appointed to such office. It is plain, however, that this provision does not limit, except as a minimum standard, the qualifications which may be required by the State Board of Education to render a person eligible for such office, except of course, as applied to present incumbents.

Section 3, Article 16, Acts of 1919, page 620, provides as follows:

> "The certificates hereafter to be granted shall be those now prescribed by law, and such professional and special certificates as the State Board of Education may authorize and prescribe; provided that the issuance of third grade certificates may be discontinued whenever the best interest of the schools may seem to require it."

From the provisions of this Section 3 last quoted it is plain that it is the intention of the Act that there shall not be any lowering of the standards required of teachers and school officials, such as county superintendents of education, but in addition to those certificates now prescribed by law, the State Board of Education shall authorize and prescribe other and additional professional and special certificates.

The very fact that this section provides that the issuance of third grade certificates now authorized, may be discontinued whenever the best interest of the schools seems to require it shows that the purpose and intention of the law is that the State Board of Education shall continue to raise the standards in accordance with its judgment.

Section 1, Article 16 of the Act of 1919, page 619, provides as follows:

> "No person shall be employed as county superintendent of education, city superintendent of schools, assistant superintendent, supervisor, principal or teacher unless such a person shall hold a certificate issued by the State Department of Education, but this section shall not operate to disqualify present incumbents except as otherwise provided."

Construing all these sections of the Act above cited and having regard to the provisions of the entire act, it is my opinion that the State Board of Education is empowered to require the holding of such certificate of administration and supervision by the county superintendent as a prerequisite to employment by the County Board of Education in all cases, except in the case of a present incumbent.

Yours very truly,

HUGH WHITE.

Assistant Attorney General.

JUVENILE DELINQUENTS:—Mayor acting as recorder may commit to Industrial School boys brought before him for violation of laws or ordinances.

April 23, 1921.

Hon. D. M. Weakley,
Superintendent, Alabama Boys Industrial School,
East Lake, Alabama.

My dear Sir:

Your letter of the 18th instant addressed to the Attorney General and requesting an opinion upon the matters therein inquired about has been received. The Attorney General has referred your request to me with direction that I furnish you such opinion.

Your inquiry is as follows:

> "Please advise me whether or not the Mayor of Mignon, Alabama, has a right to commit boys to this Institution, (Alabama Boys Industrial School)?"

Under the Act approved September 16, 1915, pages 577-589, recorders' courts which have the power to try misdemeanants against the laws of Alabama, are given concurrent jurisdiction with the probate courts of all cases of any such children (as those coming within this Act) who are arrested and brought before it charged with any such misdemeanor, or with a violation of any ordinance of such city.

Acts of 1915 page 588.

It, therefore, appears that in the case of any child within the ages prescribed by the Act, brought before the recorder charged with any such misdemeanor (as those set out in Section 1 of this Act) or with a violation of any ordinance of the city, the recorder's court has equal and concurrent jurisdiction with the probate court.

The municipal code of Alabama, Article 14, Sections 1213 to 1229, of Code of Alabama of 1907 provide that every city or town may have a recorder's court. Under Section 1221 of the Code, such recorder is given jurisdiction to try all misdemeanors committed within the city or town, or within police jurisdiction thereof.

Under Section 1228 of the Code it is provided that in cities and towns which do not elect a recorder, the mayor shall be ex officio recorder.

Assuming that the town of Mignon, Aalabama, has no recorder, and that the mayor is ex-officio recorder, under the provisions of law above cited, he has a right to commit boys under sixteen years of age who are brought before him charged with a misdemeanor or with a violation of any ordinances of such town, to the Alabama Boys Industrial School.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

PROHIBITION LAWS:—Securing alcohol permits for legitimate manufacturing purposes.

April 27, 1921.

Hon. J. K. Dixon,
Federal Prohibition Director,
Talladega, Alabama.

My dear Sir:

This office is in receipt of a number of letters stating that a recent ruling of the Attorney General of Alabama has prevented the securing of a permit to purchase alcohol necessary in manufacturing certain products. It is stated that theretofore the Government had issued permits for the amounts needed. Other letters contain a request for a ruling of the Attorney General advising that certain individuals may secure alcohol for some specified purpose. As this is a general letter replying to these various communications, I am taking the liberty of addressing it to you as Federal Prohibition Director.

It was not intended that a ruling of this office should effect a change in any well established legitimate practice of securing alcohol. As the Attorney General of Alabama is limited to advising certain officers specified in the statute, his opinion to individuals would not serve as a protection from criminal prosecution, nor would it be conclusive as to the right to secure and use alcohol.

Alabama Political Code 1907, Section 635.
Acts 1915, page 719.

However, in view of the general interest to the public, and the fact that the Federal Prohibition Director is lim-

iting permits to secure alcohol to those persons, and for such purposes, as allowed by the state statutes for the purpose of co-operating with the state authorities in enforcing the prohibition laws, as the head of the State Law Department, I am herein stating what I consider a proper construction of the statute relating to the sale and use of alcohol.

Under certain restrictions, the law permits the sale of alcohol to medical or pharmaceutical colleges, to regular licensed and practicing physicians, for medicinal purposes, to chemists and bacteriologists actually engaged in scientific work, to be used exclusively in such work and to be used in the arts or for scientific and mechanical purposes.

General Acts 1915, page 1, Sections 6, 7, 10.
General Acts 1915, page 556, Section 9.

The Supreme Court affirmed the decision of the Court of Appeals construing this law, in which it was held that this statute clearly manifested the legislative intent not to embrace within the prohibitive terms of the statute medicines authorized by and compounded in accordance with the formulas prescribed by the standard authorities, the sale of which would not subject the seller to the payment of the special tax required of liquor dealers by the United States.

Humphrey v. State, 16 Ala. App. 244, 77 So. 52.
Ex parte State, 201 Ala. 697, 77 So. 1001.

Our courts have never interpreted the meaning of the words "arts," "scientific," and "mechanical," as used in the prohibition laws of this State. Each of these words is sometimes used in a very broad sense, and each has various meanings, depending largely on the connection in which it is used. To determine the sense in which the words are used in this statute, we must search out the intent of the law-makers.

Words and Phrases (1st series) Vol. 1, page 510; Vol. 5, page 4460.

Words and Phrases (2d series) Vol. 1, page 275; Vol. 3, page 355.

Favers v. Glass, 22 Ala. 621.
Crook v. Commissioners Court of Calhoun County, 144 Ala. 505.

The purpose of what is known as the prohibition law, as declared by the law-makers and by judicial construction, is to promote temperance and to reduce and discourage the use and consumption of alcoholic liquors as a beverage. (Acts 1915, page 7, Section 16; Acts 1915, page 9, Section 3.) As stated by Mr. Justice Somerville, the purpose of the law is "to promote temperance and prevent drunkenness. * * * The evil to be remedied is the use of intoxicating liquors as a beverage rather than as an ingredient of medicines and articles of toilet, or for culinary purposes, and the object of the law must not be lost sight of in its interpretation.

Carl v. State, 87 Ala. 17, 6 South, 116.
Marks v. State, 159 Ala. 71, 48 South, 71.

The only reason of the Legislature for including within the prohibition certain non-intoxicating and non-alcoholic liquors was to lessen the opportunity for invasion of the real purpose of the law. Such prohibiltion of non-intoxicating drinks was necessary, in the opinion of the law-makers, to prevent the nullification of the law by subterfuges.

Acts 1919, page 17, Section 19.
Feebleman v. State, 130 Ala. 122.

These statutes specifically provide that the prohibition laws be liberally construed to effect the declared purpose thereof, and our courts have followed this rule of construction.

Acts 1915, page 35, Section 37.
Acts 1915, page 7, Section 16.
Priest v. State, 5 Ala. App. 171, 59 South, 318.
Grace v. State, 1 Ala App. 211, 56 South, 25.

A liberal construction to effect the purpose of the law as strongly demands a liberal interpretation of the phrase, "to be used in the arts and for scientific and mechanical purposes," so as to include every purpose intended, as it demands the absolute inhibition of those purposes inimical to the effective enforcement of the law. The law did not intend to effect a suppression of legitimate business by preventing the use of alcohol for purposes which do not readily lend

themselves to be used as a cloak to cover violations of the spirit of the law. It was evidently the intention of the law-makers that the phrase, "to be used in the arts and for scientific and mechanical purposes," should be given a broad and liberal interpretation so as to include as far as possible those purposes, the prevention of which is not essential to a proper enforcement of the intent of the acts.

Marks' case, supra.
Carson v. State, 3 Ala. App. 206, 58 South. 88.
Humphrey's case, supra.

This office is advised that alcohol has heretofore been regularly secured under the provisions of the 1915 acts for purpose for which permits are now refused. The Legislature has not changed the provisions of the 1915 act, which define the purposes for which alcohol can be secured. The established and recognized practices under a law are not necessarily legal, but it does amount to a contemporaneous construction of the law which creates a strong presumption in favor of the validity of the practices. Especially is this true where the Legislature directs its attention to correcting abusive practices under the law, as did the Legislature of 1919, and of its attempting to forbid such established practice. (See Humphrey's case, supra, and Section 13½, Acts 1919, page 15.)

Macon County v. Abercrombie, 184 Ala. 286, 63 South. 985.
Shepherd v. Sartin, 185 Ala. 439, 64 South. 57.
State v. Board, 183 Ala. 283, 63 South. 78.

The law-makers, to prevent abuses of this provision permitting the securing of alcohol for certain purposes, made it a crime to secure it for an unauthorized purpose, and also made it a crime when secured for an authorized purpose to divert it from such use. To permit its being obtained for such legitimate purposes should, therefore, have no tendency to break down the enforcement of the law.

Yours very truly,
HARWELL G. DAVIS,
Attorney General of Alabama.

BOARD OF CONTROL AND ECONOMY:—Use of revolving fund for purchase of multigraph machine, for payment of salaries, or for loans to State institutions. Where State has existing contract for certain stationery, the Board is limited to purchasing from contractor.

April 28, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

Your letter of February 7th by Hon. J. L. Purifoy, Assistant Examiner, requesting an opinion of the Attorney General upon the matters therein inquired about, has been received. Press of business has prevented the Attorney General from furnishing such opinion before now. He has referred your letter to me with direction that I advise you upon the matters inquired about.

For the sake of convenience I will number your several inquiries and set them out below as follows:

1. "Will you obtain from the Attorney General an opinion whether this fund, or any part thereof, could be used to purchase a Multigraph Machine and envelopes and paper for the purpose of printing envelopes, letter-heads and blanks for the use of the State Departments?"

2. "Did the Board of Control and Economy have any authority, under the law, to use any part of the Revolving Fund in the payment of any salaries?"

3. "Did the Board of Control and Economy have any authority, under the law, to use any part of the Revolving Fund for the purpose of making a cash loan or advancement to any institution of the State?"

4. "The State having a contract as required by the Constitution and laws for certain stationery, supplies and public printing, then, in the purchase of any supplies for the use of the State Departments for the furnishing of which a contract has been entered into by the State with a certain stationery concern, and in having the printing done for any State Department and paying for the same, which has been contracted for by the State with a certain printing company, was,

or was not, the Board of Control and Economy limited in such purchases, and in such work, to the making thereof or having the same done by those concerns with which the State had at the time existing contracts?"

I beg to advise you as follows:

The Revolving Fund referred to is provided under Section 5 of the Act approved September 30, 1919. The purposes for which such Revolving Fund was created and to which the funds provided may be appropriated are set forth in this Section 5. The section states that such fund is provided to enable the Board "To make emergency purchases and purchases in quantities, or by wholesale, of supplies and equipment . . . in order to enable it to obtain special bargain or low prices or reduced prices incident to quantity purchases, as well as to enable it to have on hand supplies in quantities of commodities of common use for any of the several institutions and departments served by it."

It appears that the purposes for which this Revolving Fund is furnished may be grouped into two classes:

First: Emergency purchases.

Second: Purchases in quantities or by wholesale of supplies and equipment where by making purchase in quantities or by wholesale the Board is enabled to obtain special bargain or low prices or reduced prices incident to quantity purchasing.

Answering your first inquiry above set out, the purchase therein named must be referable to one or the other of the two classes of purchases above set out as emergency purchases, or purchases in quantities or by wholesale, before the Board of Control would be authorized to make such purchase out of the Revolving Fund. You do not state in your inquiry the circumstances under which such purchase was made, or is proposed to be made. If said purchase is a part of such a purchase in quantity or by wholesale as above stated, the Board of Control would be authorized to make same. If it were not a purchase in quantity or by wholesale as above stated, the Board of Control might still be authorized to make the purchase out of the Revolving Fund if the same constituted "an emergency purchase."

The word "emergency" is defined as meaning any event or occasional combination of circumstances which calls for

immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition. 15 Cyc. 542.

The older use of the word shows that it was applied to an event, or condition which was unexpected or that could not reasonably have been foreseen. The meaning of the term, however, by usage has been enlarged so as to make it apply to any situation of pressing necessity which calls for immediate action or remedy. As used in Section 5, above referred to, I am of the opinion that the word is used to apply not only to a situation or condition which was unexpected or unforeseen, but also in its widest sense as applied to any situation which calls for immediate action or remedy. I am inclined to this view because of the general authority vested in the Board by these acts of the Legislature and the wide scope of its powers with respect to purchasing for the institutions with which the Board is charged under the Acts named.

Whether the purchases inquired about in your inquiry numbered 1 above, would be authorized by the Board of Control out of the Revolving Fund can be determined from what is above stated.

In making any expenditure out of this Revolving Fund provided under Section 5, Acts of 1919, page 1120, careful consideration must always be given to the requirement of said Section 5 that any amount so expended must be paid back to this fund out of the funds of the particular institution, or department for which expenditure has been made.

In answer to your second inquiry above stated, it is my opinion that it was not the intention of the Legislature that such Revolving Fund should be used in the payment of any salaries. Such use of this fund certainly could not be referred to the second class of purchases provided to be made out of this fund, namely in quantities or by wholesale. I do not think that payment of salaries can reasonably be referred to the class of emergency purchases authorized to be made out of such fund. It is true that the necessity for payment of such salaries might under some circumstances constitute an emergency. But in determining whether payment of such salaries could be referred to "emergency purchases," consideration must be given to the meaning of the word "purchase." This word has a num-

ber of different meanings, depending upon the context in which it is used. As used in Section 5, however, it is my opinion that the word is used in its common or commercial sense as meaning "to buy."

Words and Phrases, Volume 7, page 5854.

As used in this sense, I do not think the term "purchase" could be reasonably construed as including the payment of salaries.

In answer to your third inquiry above stated, it is my opinion that the Board of Cotnrol has not authority to use any part of this Revolving Fund for the purpose of making cash loans or advancement to any institution of the State. By this I mean a loan or advancement in cash to any such institution, which loan or advancement the institution could thereafter use as it might please or determine for any of its uses. Said Section 5, Acts of 1919, page 1120, provides such Revolving Fund to enable such Board to make purchases of the character therein described. Near the conclusion of said section there is this provision: "A complete record shall be kept in the office of the Board of all such purchases." While this Act provides that the Board may use this Revolving Fund for making purchases as therein described for State institutions, it is clearly, I think, the purpose of the Act that the expenditure of any money provided by the Board out of this fund should be expended by the Board, or under its direction for the purpose for which the money is advanced. I think the Act contemplated that the records of the Board of Control should show for what purpose any such money advanced is to be expended by the institution to which the advancement is made.

In answering your fourth inquiry above set out I beg to advise as follows:

Our Supreme Court has held that Section 69, Article 4, of the Constitution which requires that all stationery, printing, paper, etc., used in the legislative and other departments of government shall be furnished, and the printing, binding and distribution of laws, journals, department reports, and all other printing, binding, etc., shall be performed under contract, etc., is not self-executing, and has only moral force until legislative enactment has been had to put such provisions of the Constitution into effect. Such

provision "being merely mandatory, it is inoperative until aided by legislative enactment and is operative only to the extent that the supplemental legislation imparts vitality." The legislature under Section 578, Section 1647 and 1648 of the Code of 1907, and by Section 4 of the Act approved September 30, 1919, Acts 1919, page 1120, has made provision for giving effect to this constitutional provision with respect to all the stationery, printing and supplies provided to be purchased under said sections named. In so far as the stationery, printing and supplies are concerned which are included in said sections of the Code and in said Section 4 of said Act, it is my opinion that the law requires the same to be purchased under a contract as therein provided; and that where such contract has been made, it would be the duty of the Board of Control to obtain such stationery and printing under such contract. To hold otherwise, it seems to me, would be to hold that this provision of the Constitution, after having been made effective by the legislation named, could be ignored.

If the stationery, supplies and printing, referred to by you, does not come within the terms of said Sections 578, 1647 and 1648 of the Code, nor within said Section 4, Acts 1919, page 1120, nor within any other legislative enactment to give effect to said Section 69 of the Constitution, then said Section 69 of the Constitution would not apply and the Board of Control would not be obliged to conform to its provisions in making such purchases or in having such printing done.

Brown v. Seay, 86 Ala. 122.

Very truly yours,
HUGH WHITE,
Assistant Attorney General.

NEWS DEALER'S LICENSE:—Soliciting subscriptions to magazines published outside State, to be delivered by mail, is interstate commerce, not liable for license.

Hon. Thos. E. Kilby, April 30, 1921.
Governor of Alabama,
Capitol.

My dear Sir:

Assuming the statement of facts in the attached letter from F. R. McCabe to be true, his transactions in simply

soliciting subscriptions to magazines published outside of Alabama, and to be delivered to the subscribers through the mail, undoubtedly constitute interstate commerce within the meaning of the federal constitution. Neither the State nor any subdivision thereof can constitutionally collect a license tax on interstate commerce.

Dozier v. State of Alabama, 218 U. S. 124, reversing the decision of our Supreme Court in 154 Ala. 83.
Utah v. Bayer, 19 L. R. A. (N. S.), page 297 and notes.
State v. Williams, 40 L. R. A. (N. S.), page 289 and notes.

I return the letter referred to us.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

CORPORATION FRANCHISE TAX:—Enforcement of State's lien against merged, insolvent, or bankrupt corporations.

April 30, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My dear Sir:

Your inquiry in reference to the franchise tax due by the Alabama, Tennessee & Northern Ry., and its predecessor corporations, raises a great many questions as to the liability of domestic corporations for a franchise tax. We have also had several other inquiries from you, each presenting a slightly different phase of the same question.

This letter, therefore, will attempt to give a complete and comprehensive answer to all of your inquiries.

We will discuss the liability of domestic corporations for a franchise tax, and the existence and enforcement of liens for such taxes, in the following named instances:

First: Where the stockholders of a domestic corporation, without dissolving it in the manner required by law, and without paying the franchise tax due by said corporation, distribute all the assets of the corporation among themselves.

Second: Where a domestic corporation without being dissolved as prescribed by statute, sells all its assets to another corporation, individual or partnership.

Third: Where two or more domestic corporations consolidate, forming a new domestic corporation, or where one or more domestic corporations are absorbed by or merged into an already existing domestic corporation.

Fourth: Where an insolvent domestic corporation is placed in the hands of a receiver in an equity court, and its assets administered and sold under a decree of that court. This instance includes several constituent inquiries: (a) The title of the receiver to the assets administered: (b) The liability of the receiver for franchise taxes already due and those accruing during the pendency of the receivership; (c) The existence vel non of a lien for franchise taxes on the assets sold under the decree of the court.

Fifth: Where a domestic corporation is duly adjudicated a bankrupt and its assets sold under a decree of the bankruptcy court. This instance, likewise, involves several constituent inquiries, similar to those stated above.

Before discussing separately and in detail each of the above named instances, we will attempt, first to determine whether the State has a lien on the property of domestic corporations for the franchise taxes due by them.

Section 368 of the Revenue Law of 1919, (Acts 1919, page 443), provides:

> "The State and counties shall have a lien superior to all other liens upon all the goods, wares, and merchandise of any person liable for the payment of license taxes due to the State or County, and all costs, which said lien may be enforced by attachment in one and the same suit and in the name of the State."

The above provision originally appeared as Section 2363 of the Code of 1907, and, with only slight verbal changes, has continued to be the law since.

Section 416 of the Revenue Law of 1919 (Acts 1919, page 449,) fixes a lien in favor of the state and county for taxes due on all ad valorem assessments of property.

This provision is brought down from Section 2093 of the Code of 1907, and similar sections in prior codes.

We quote the above provisions, fixing liens for both license and ad valorem taxes, as indicating the intention of the legislature that *all* taxes should be secured by a lien. The history of all our revenue laws shows that the legislature has in a broad sense divided all taxes into two general classes: (a) ad valorem taxes and (b) license taxes. The tax lien laws were enacted with this broad classification in mind, and without any legislative attempt to draw any nice or technical distinction between a franchise tax, levied simply on the right of corporate existence, and a license tax proper, levied on the right of this same corporation to engage in a particular line of business. Strictly speaking, the franchise tax levied under our constitution is on the right to *be*. A license, or privilege tax technically construed, is on the right to *do*. However, the decisions of our own and other courts have construed a franchise tax as a license tax.

In K. C. M. & B. R. R. Co. v. Stiles, 182 Ala. 142 (affirmed by U. S. Supreme Court, 242 U. S. 211), Judge Somerville, in speaking of our franchise tax, says:

> "The tax thus exacted of domestic corporations is primarily a *license tax* for the continued exercise of their corporate franchise. Sou. Ry. v. Green, 160 Ala. 396. The payment of such a tax is one of the conditions imposed by the sovereign "upon its own creatures in consideration of the boon of corporate life and the enjoyment of corporate functions and powers."

In Spira v. State, 147 Ala. 178, our court, in discussing a corporation tax almost identical with our present franchise tax, says:

> "From an examination of the various statutes on kindred subjects, we do not think that the legislature had in mind any marked distinction between a *license tax* and a privilege tax, but it seems to have used the terms interchangeably."

Gray on Limitation of Taxing Powers, page 41, thus describes the kind of franchise tax under consideration:

> "Where a tax is imposed in the shape of an annual charge or excise upon the right to *continue corporate*

existence that also is not a *property tax,* but a *privilege or license tax,* just as is an organization tax."

The above excerpt from Mr. Gray's work was quoted approvingly by our Supreme Court in Sou. Ry. v. Green, 160 Ala. 408.

In our own recent Income Tax Case—Eliasberg Bros. Merc. Co. v. Grimes, 86 So. 62,—the attorneys for the taxpayer ably argued that the income tax must be either (a) a business, occupation, or privilege tax, or (b) a property tax within the meaning of Section 214 of our Constitution. Our Supreme Court sustained this contention. Quoting from opinion of Mr. Justice Somerville:

> "It is not suggested that the tax laid on incomes by our Revenue Act of 1919 is an occupation or a business or a privilege tax, or that it is anything but an income tax in the comprehensive sense in which it has been heretofore defined and considered. It must, therefore, be held to be a direct imposition upon 'property' as such, as that term is used in Section 214 of the Constitution of Alabama."

Our Supreme Court has thus again, in its latest expression on the subject, clearly divided all permissible taxes into two general classes, namely: (1) property taxes, and (2) privilege or license taxes.

Other authorities treat a franchise tax as synonymous with a license tax.

> Collier on Bankruptcy (10th Ed.), page 894.
>
> "An annual *license tax or franchise tax* required to be paid by a corporation as a consideration of its continued existence, and based upon the amount of its capital stock issued and outstanding, is a tax within the meaning of this section."
>
> 8 Fletcher Cyc. Corp., Sec. 3371:
>
> "And a *franchise tax* or *license fee,* even though imposed after the appointment of a receiver and although he has exercised none of the corporate franchises since his appointment, has been held entitled to a priority."

In Conklin v. U. S. Shipbuilding Co., 148 Fed. 129, Lanning, District Judge, in construing a franchise tax similar

to ours, speaks of it as "a certain *license fee* or *franchise tax.*"

In view of the position taken by our own and other courts and learned tax writers on the technical subject of taxation, it would be too great a strain on credulity to indulge the presumption that our legislature has drawn distinctions which courts and text writers refuse to recognize. It is certainly more reasonable to presume that our legislature, in enacting two tax lien laws,—one as to *ad valorem taxes* and the other as to *license taxes,*—intended to fix a lien for *all taxes.* Unless the franchise tax proper is embraced in one or the other of these lien statutes, then the legislature stands convicted of a most arbitrary and unusual discrimination in favor of one single class of taxpayers.

The above argument certainly shows that in a broad sense, irrespective of technical distinctions, our legislature and our Supreme Court have treated a *franchise tax* as a *license tax.* The conclusion is inevitable that the legislature intended that the lien for *license taxes* should include *franchise taxes.*

Persuasive as this argument may appear, there are even other reasons more compelling to the same conclusion.

Section 2411 of the Code of 1907 provides specifically for the refund of *license* money. This section was amended at the Special Session of the Legislature of 1909 (Acts Sp. Sess. 1909, pages 165 and 166) by adding the following provision:

> "And any person who, through mistake or error in the probate judge, has paid to the probate judge money that was not due him for such license, or by such mistake has paid to the probate judge for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded to him the amount in either event so erroneously collected by the probate judge, and the provisions of this section shall apply in cases where money has heretofore been so erroneously paid within two years before the approval of this Act."

Section 2411 of the Code of 1907 is a part of Article 21 which relates solely to *license taxes.* This section, as amended by the Act of 1909, with some verbal changes not affecting the meaning of its provisions, is now found in Section 375 of the Revenue Law of 1919 (Acts 1919, p. 445).

A franchise tax on domestic corporations, graduated according to paid up capital stock, was in existence at this time—Code 1907, Sec. 2361, subdivision 26.

The question as to the refund of franchise taxes, under Section 2411 of the Code of 1907, as amended (which in terms apply only to *license* taxes), has been before our Supreme Court several times.

The question was first presented in Bigbee Fertilizer Co. v. Smith, Auditor, 186 Ala. 552. In this case the fertilizer company was asking for a refund of franchise tax paid under subdivision 26 of the Section 2361 of the Code of 1907. The argument there made by the Attorney General, in resisting the refund, was that this was not a *license tax,* within the purview of the statute, but a mere *privilege tax* levied upon its franchise as a corporation within this state. Chief Justice Anderson, in disposing of this contention, says:

> "Counsel contend, however, that the Act in question provides only for refunding a *license tax* (italics ours) and not a *privilege tax,* and that the tax sought to be recovered was made a privilege tax under the terms of the subdivision 26. Whether there is or is not a substantial distinction between a license tax and privilege tax we need not decide, though this court has intimated that there is. Montgomery v. Kelly, 142 Ala. 552. On the other hand, it was stated in the case of Spira v. State, 146 Ala. 177, in discussing this statute, that the *legislature did not have in mind* any marked distinction between a *license tax* and a *privilege tax,* but seems to have used the words interchangeably. We think the Act in question contemplates the refunding of the fund in question whether it be designated as a *privilege tax,* or as a *license tax.* The Act covers all moneys paid for a license whether it was paid strictly as a *license tax* or as a *privilege tax.* It refunds "license money" and under the terms of subdivision 26, the sum

there required is for a *license*, the issuance of which is contemplated and required." (Italics ours.)

The decisions in the Bigbee Fertilizer Company case, construing a *franchise tax* as synonymous with a license tax so far as the right to refund of license taxes is concerned, has been followed by our Supreme Court in the following cases:

Loveday v. Loveman, Joseph & Loeb, 191 Ala. 96.
Smith, Auditor, v. T. C. I. & R. R. Co., 192 Ala. 129.
Allgood, Auditor, v. S. S. S. & I. Co., 196 Ala. 500.
Singer Sewing Machine Co. v. Teasley, 198 Ala. 673.
Turner v. Anniston Elec. & Gas. Co., 200 Ala. 89.

It follows necessarily from the above decisions that so far as refund of license taxes is concerned, our Supreme Court has uniformly and consistently construed a franchise tax as a *license tax.*

Williams, Probate Judge, v. State, 195 Ala. 188, which may appear at first blush to support a contrary conclusion, is really confirmatory of the position above taken. The legislature of 1915 passed two separate and distinct Acts relating to taxation—one relating to ad valorem assessments of property and the other the license Act proper. Contrary to the custom of preceding legislatures, this legislature placed the *franchise tax* in the body of the ad valorem Act. This was no specific provision in this Act as to when the *franchise tax* should become due and payable, though Section 8 of said ad valorem Act does expressly provide that "all taxes, unless otherwise directed, shall become due and payable on the first day of October in each year* * *" Section 18 of the *license act* proper makes all license taxes due on October 1st, instead of January 1st, as formerly.

The sole question on the Williams case, supra, was whether the *franchise tax* was due on October 1st, as fixed for all licenses by the law of 1915.

The Court held that the legislature, in dealing with a franchise tax and other license taxes in separate and distinct Acts, recognized a distinction between them as to when each should become due and payable; and that Section 18 of the license Act proper, fixing *the time,* when license taxes shall become due, was not intended to apply to the *franchise*

tax, levied by a separate and distinct Act. Having come to the conclusion that the franchise tax was not governed by the provisions of the license law proper of 1915, the Court was compelled to decide whether the franchise tax of 1915 was invalid in toto, because *no time* had been fixed for its payment, or whether there was some *existing* law which fixed the time for the payment of this franchise tax. Although the franchise tax was embedded in the body of the ad valorem Act, which itself, by Section 8 thereof (as above noted), fixed October first as the time for paying taxes covered by it, the Court did not refer the time for paying the franchise tax to this particular section. The conclusion of the Court in thus succinctly stated:

> "While Section 16 of the new revenue law (Acts 1915, page 397) fixes a franchise tax on all corporations and provides for the payment and collection of same, it does not attempt to fix the time for the payment of same or the commencement of the tax year. Therefore, the time for the payment of a franchise tax and the period that the same should cover is fixed by Acts 1911, p. 184, Sections 33B and 33G, and Code 1907, Section 2403."

We need only to set out the sections referred to, to show the significance of this conclusion:

> Acts 1911, page 184.
>
> "Sec. 33B. In all cases in this Act where population controls the amount of license, the last census report of the federal government shall govern. The licenses herein levied are payable on the first day of January, and the amount of privilege and franchise taxes required to be paid under this Act is intended as a per annum tax, unless otherwise specified."
>
> Sec. 33G. It shall be unlawful for any person, firm or corporation to engage in or carry on business, or any act for which a license or franchise tax is by law required without having first paid for or taken out a license therefor in the manner as provided by law."
>
> Code 1907, Sec. 2403:
>
> "All licenses shall expire on the thirty-first day of December, in each year, and shall be for one year, un-

less the business licensed shall commence after the first of July, in which case the price of the license shall be half of the amount of the year's license."

This decision clearly shows that our Supreme Court again recognizes the fact that our legislature, in enacting tax laws, divides all taxes into two broad classes: (1) Property taxes, and (2) license taxes.

If, as the above decisions show, a *franchise tax* is a *license tax* (1) for the purpose of a refund and (2) for the purpose of fixing the time of *its payment,* logic and common sense compel the conclusion that the *franchise tax* is a *license tax* within the meaning of our laws *fixing a lien* for license taxes.

This brings us to a discussion of the five instances enumerated at the beginning of this opinion.

First: Where the stockholders of a domestic corporation, without dissolving it in the manner prescribed by law, and without paying the franchise tax due by said corporation, distribute all the assets of the corporation among themselves.

In an opinion recently rendered by this office, we held, under the authority of Adams v. Perryman, 202 Ala. 469, that the stockholders were personally liable to the creditors of the corporation up to the value or proceeds of the corporate property each has received.

Second: Where a domestic corporation, without being dissolved as prescribed by statute, sells all its assets to another corporation, individual, or partnership.

If we are correct in the conclusion above reached, that the State has a lien on corporate property for all franchise taxes due, then this lien for the taxes then due attaches to the property in the hands of the purchaser. If this is a bonafide sale, and no element of fraud enters into the transaction, subsequent creditors of the corporation cannot complain of a disposition of property made by such corporation.

Wilson v. Stevens, 129 Ala. 630.

The corporation itself, continuing to exist until dissolved by law, continues liable for all franchise taxes falling due subsequent to the sale.

7 R. C. L., pp. 183 and 184, lays down this rule:

"It is important to distinguish a consolidation proper and the purchase of the assets of one corporation by another * * * it may be stated as a general rule that in order to render the purchasing company personally liable for the debts of the selling corporation, it must appear that (a) there be an agreement to assume such debts (b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; or (c) that the purchasing corporation was a mere continuation of the selling corporation; or (d) that the transaction was fraudulent in fact. Still a court of equity will scrutinize with jealousy such a transaction whereby the assets of an insolvent corporation are diverted from its creditors."

Burnwell Coal Co. v. Setzer, 203 Ala. 395, shows that our court closely scans any transaction whereby all the assets of one corporation are conveyed to another. The holding in this case is well stated in the eighth headnote.

"Where one corporation after it became liable for the death of plaintiff's intestate, which resulted from its negligence, conveyed all of its property to another corporation, and the same person was president of both corporations, held that the granted corporation was chargeable with notice of the demand against the grantor corporation."

Quoting from the opinion rendered by Chief Justice Anderson:

"While we have treated the transaction between the Burnwell Coal Company and the American Company as a purchase, rather than a consolidation or merger, it matters not what it may be called, as the circumstances connected therewith and as disclosed by the chain of title stamped the transaction as invalid as against creditors of the first corporation, and charged the Burnwell Mining Company with notice of such facts, as to call for inquiry and investigation upon the part of a prudent person, and which, if followed up, would have led to actual notice of the plaintiff's claim or demand against the Burnwell Coal Company."

Third: Where two or more domestic corporations consolidate, forming a new domestic corporation, or where one or more domestic corporations are absorbed by or merged into an already existing domestic corporation.

A merger or consolidation of corporations destroys the corporate existence of the original companies. It does not, however, affect any existing liabilities of the original companies. Section 3506 of the Code, which is simply declaratory of the already existing law, expressly preserves all rights and liens of creditors of any of the former corporations; and the consolidated corporation is made liable for all the debts of any of the former corporations to the same extent as if such debts had been incurred or contracted by it.

This would be the law even in the absence of the above statute.

7 R. C. L., pp. 181 and 182.

The liability for the franchise tax had fastened itself on the original constituent corporations before the merger or consolidation had been effected. These taxes, therefore, can now be collected from the consolidated or merged corporation.

Fourth: Where an insolvent domestic corporation is placed in the hands of a receiver in an equity court, and its assets administered and sold under a decree of that court.

As above stated, this instance includes several constituent inquiries:

(a) The title of the receiver to the assets administered: (b) the effect of the receivership on the continued liability of the corporation for franchise taxes: (c) the liability of the receiver for franchise taxes due at the time of his appointment: (d) the effect of a sale of the corporate assets, under a decree of court, on the lien of the State for the franchise taxes due it.

It is, we think, well settled that "the appointment of a receiver does not dissolve the corporate entity or terminate its legal existence."

In Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 264 Fed. 525, 526, the Court said:

"Did the appointment of the receivers for the plaintiff corporation deprive the plaintiff of its power to make the contract in question? It is well settled that the appointment of a receiver of a corporation does not dissolve the corporate entity or terminate its legal existence. Chemical Natl. Bank v. Hartford Deposit Co., 161 U. S. 1; Du Pont v. Standard Arms Co., 9 Del. Ch. 315, 81 Atl. 1089.. This is true, even though the decree appointing the receivers also enjoins the corporation from exercising its powers and franchises. Kincaid v. Dwinelle, 59 N. Y. 548.

See also:

Alderson on Receivers, pp. 505, 509.
Re Dressler, 262 Fed. 257.
8 Fletcher Cyc. Corporations, Sec. 5280.

It is also well settled that a receiver acquires no greater right or title to the assets of the corporation than the corporation itself had.

As said by Justice Somerville in Oates v. Smith, 176 Ala. 47:

"The receiver succeeds to the assets as they are, and subject to every specific right and equity which existed against the insolvent."

In Black v. Manhattan Trust Co., 213 Fed. 692, the Court says:

"A receiver by his appointment as such acquires no greater or superior right or interest in the property coming into his hands than the debtor had, and in this relation may be said to stand in the shoes of the debtor; and, furthermore, as a general rule, the receiver takes the property in the same plight and condition, and subject to the same equities and liens, as he finds it in the hands of the person or corporation out of whose hands it is taken. 34 Cyc., 191, 193."

7 R. C. L., pp. 751 and 752:

"The insolvency of a corporation and the assumption of jurisdiction by a court of equity for the dis-

tribution of its assets among creditors do not destroy any liens at law or in equity existing in favor of any of its creditors."

Talladega Merc. Co. v. Jenifer Iron Co., 102 Ala. 259, headnote one:

"The appointment of a receiver does not affect the title of the property entrusted to him; and when a judgment creditor has obtained a lien upon the property of his judgment debtor before the appointment of a receiver thereof, the lien is not destroyed or impaired by such appointment, but the receiver is seized of the property subject to said lien."

To the same effect:

Southern Granite Co. v. Wadsworth, 115 Ala. 570.

The lien for franchise taxes is not only unaffected by the *appointment* of a receiver, but it is equally unaffected even by a *sale* of the corporate assets under a decree of court. The receiver having acquired the property subject to such lien, no subsequent sale of the property will destroy this lien.

Black v. Manhattan Trust Co., 213 Fed. 692:

"A purchaser at a receiver's sale takes the property subject to all subsisting paramount liens, and such liens are not divested or affected by such sale, as against strangers to the record."

See also:

1 Clark on Receivers, Sec. 639.
Beach on Receivers (Alderson's edition), pp. 783, 785, 786.
23 R. C. L., p. 100.
Matter of Coleman, 174 N. Y. 381.
People v. Banking Co., 189 N. Y. 236, 237.
Howard v. Ry Co., 101 U. S. 849.
Title & Trust Co. v. Ry. Co., 189 Pa. St. 3770.

It is well established law in Alabama that the rule of caveat emptor applies with full force to all judicial sales,

and that the purchaser acquires only such title as the defendant in the process had.

Winter, Loeb & Co. v. Montgomery Cooperage Co., 169 Ala. 628.
5 Mayf. Dig., p. 573.
9 Michie Dig., p. 255.

The liability of the receiver for franchise taxes due at the time of his appointment is well established.

8 Fletcher Cyc. Corp., Sec. 5280-5470.
Authorities, supra.

The continued liability of the corporation and the receiver for franchise taxes pending the receivership is equally well established. This conclusion would naturally follow from the above authorities which hold that the appointment of a receiver does not dissolve a corporation or terminate its legal existence. But the weight of express authority supports this conclusion.

8 Fletcher Cyc. Corp., Sec. 5371:

> "There is a conflict in the decisions as to whether a receiver of a corporation should be required to pay the franchise taxes accruing during the receivership for the privilege of doing business in a corporate capacity. This is answered in the negative in some jurisdictions, at least in cases where the corporation was actually or in effect dissolved at the time the tax was assessed or was enjoined from doing business. According to the weight of authority, however, where there is no actual dissolution, the estate in the hands of the receiver is liable for such a tax where the receiver is conducting the business and exercising the franchise."

The decision mainly relied on in support of the minority view is the one rendered by the United States Supreme Court in United States v. Whitridge, 231 U. S. 144.

This decision was one construing a federal statute which imposed an excise tax on the *doing of business* by corporations, such tax being based on the net income of such corporations. The opinion in this case does not even remotely

touch the liability of a receiver of a domestic corporation for a franchise tax imposed on such domestic corporation by the state where it is incorporated. This opinion does not in terms, or by inference, pass on this particular question. The court, in construing a federal statute, simply holds that the spirit and letter of the law prevent the imposition of this *excise* tax on a receiver of a corporation. Nor would any decision of a federal court be binding on our own court in construing our own franchise tax laws. On the contrary, the federal courts follow state courts in their interpretation of state statutes.

> Marshall, Receiver, v. N. Y., 41 Sup. Ct. Rep., p. 143 (decided Dec. 20, 1920).

In Conklin v. U. S. Shipbuilding Company, 148 Fed. 129, it was held that the annual franchise tax, imposed on corporations by the New Jersey statute, is a valid preferred charge against the assets of an insolvent corporation, being administered by a receiver of a court of equity within the state, whether state or federal, *so long as the corporation remains undissolved.*

In the United States Car Company Case, 60 N. J. Ep., p. 516, the Court, in affirming the liability of a receiver for a franchise tax, says:

> "It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The State, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchises, or whether or not it is exercising them, either by its officers and directors or through a re-

ceiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the *existence or non-existence of the corporation.* (Italics ours.)

As said by Mr. Justice Peckham, (later an associate justice of the United States Supreme Court), in Central Trust Co. v. N. Y. & C. R. R. Co., 1 L. R. A., p. 246:

> "The franchise was in existence, and was actually used; and no decree of dissolution had ever been pronounced. The agent who used the franchise was an officer of the court, acting under its authority instead of the board of directors; but it was the franchise of the company which was in use at all times."

The note to Cox v. Title Guarantee Co., L. R. A., 1915 E., p. 220 et sequitur, collects the authorities on both sides of this question. An examination of the note confirms the statement in Fletcher Cyc. Corp., supra, that the weight of judicial opinion supports the view that a receiver of a corporation is liable for a state franchise tax on said corporation during the time of the receivership.

Fifth: The last case is where a domestic corporation is duly adjudicated a bankrupt and its assets sold under a decree of the bankruptcy court.

It is hornbook law that a state has exclusive control over the creation and dissolution of its own corporations. The disposition of the assets of a domestic corporation, under the bankruptcy law, does not destroy the life of such corporation.

> 8 Fletcher Cyc. Corp., Sec. 5204:
> "An adjudication of bankruptcy does not dissolve a corporation or terminate its existence."

Consequently, the corporation itself, even after discharge under the bankruptcy law, is still liable for the franchise. This conclusion, however, is of no practical importance, as all the assets out of which collection of the tax could be made have been sold under a decree of the court.

The practical question is, whether an adjudication of bankruptcy and a sale of corporate assets under a decree of

the bankruptcy court destroys the lien for such franchise taxes.

We think not. The bankruptcy law expressly provides that a discharge in bankruptcy shall not release a bankrupt from taxes due the United States, the State, or the county, district or municipality in which he resides. 9 U. S. Comp. Statutes, Annotated, Sec.9601. Provisions are also made in the bankruptcy law as to liens against the property of a bankrupt 9 U. S. Comp. Statutes, Annotated, Sec. 9651. Sections 9654 of the same volume provides that the trustee in bankruptcy succeeds to the title of the bankrupt.

The numerous decisions cited in the notes to the above named sections conclusively show:

First: That a trustee in bankruptcy, like a receiver in equity, acquires only such right, title and interest as the debtor or bankrupt had.

Second: That a sale under a decree of the bankruptcy court is made subject to all valid, existing liens on the assets sold, which are not expressly stricken down by the bankruptcy law itself.

Third: That debts and liens for taxes are in no wise affected by bankruptcy proceedings.

The very language of the bankruptcy statute, followed by a long line of decisions too numerous to cite, sustained the above conclusions. Our own court is in accord with these decisions.

Stevenson v. Bird, 168 Ala. 422.
Winter, Loeb & Co. v. Cooperage Co., 169 Ala. 628.

This lien for franchise taxes is, of course, a statutory lien, created by operation of law, and not by the act of the party against whom it is invoked. It is not for that reason any less binding or effective. Chief Justice Brickell, in Colt. v. Barnes, 64 Ala., pp. 121 and 122, says:

> "Liens in the nature of mortgages, created by statute, for the protection and indemnity of the state, are not infrequent in our legislation. They have not been regarded as of less force, or more limited in operation, than similar liens created by contract between individuals. In construing them, from the purpose for which

they are created, and the terms employed in creating them, their scope and operation have been determined, as the scope and operation of a mortgage or other encumbrance would be ascertained."

We will not attempt to recapitulate the several conclusions reached above, as we have tried to so subdivide our discussion of the several inquiries involved that each separate conclusion rests on the reasoning and authorities given in that particular subdivision.

Yours very truly,
HENRY P. WHITE,
Assistant Attorney General.

REMISSION OF FINES:—Judge of county court has no power to remit fines after close of term at which imposed.

May 3, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The letter of Mr. Brooks, referred by you to this office for reply, raises the following questions:

First: Has the probate judge, as ex-officio judge of the county court, authority to remit fines imposed by him on defendants convicted, or to reduce such fines below the minimum limit fixed by law?

Second: If these fines have been wrongfully remitted or reduced, is the judge of the county court liable to the county for the loss sustained?

We must bear in mind, at the outset, that there is a broad distinction between the right to *remit* a fine, which is a purely executive prerogative and the control which a court exercises in term time over all judgments rendered by it at that particular term. The authority of the court in this respect is well expressed by Justice Clopton in *ex parte* State, in re Newton, 94 Ala. 433:

"The general power of the court to set aside or modify its unexecuted judgments, during the term at which they were made, in criminal cases, is not, and cannot be

> denied. * * * The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend *nunc pro tunc* for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piece-meal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that imposed."

See also:

> Raley v. City of Decatur, In MS., Court of Appeals, decided April 19, 1921.

County Courts hold monthly terms on the first Monday of each month, and may continue until the business is disposed of.

> Code 1907, Sec. 6701.

Section 6702 of the Code of 1907 provides that the county court shall be open, at the discretion of the judge, any day in the week, except Sunday, for the trial of cases, where the party or parties charged cannot give bond for appearance at the regular terms, or where such parties desire an immediate trial.

This last cited section, in effect, provides for special terms for the particularly designated purposes and does not confer on the court power to revise or modify at these special sittings judgments rendered at the regular monthly term preceding. We are of the opinion also that, when the court has concluded the particular business at any special sitting, it is without power, thereafter, at any special or regular term, to modify the judgment made at any previous special or regular term.

Eliminating, then, from your inquiry, any case which falls within the rightful power of the court to revise its own judgments during the term, when rendered, we have reached the conclusion that the judge of the county court is wholly without power to remit in whole or part any fine imposed by him.

Section 124 of our Constitution provides: "The governor shall have power to remit fines and forfeitures, under such rules and regulations as may be prescribed by law."

Sections 42 and 43 of the Constitution divide the government of Alabama into three distinct departments—executive, legislative and judicial—and prohibit and department, except as expressly directed or permitted in the Constitution, from exercising any of the powers committed to another department.

The same or similar provisions were contained in all of our former constitutions.

Haley v. Clarke, 26 Ala. 439, presents a case squarely in point. The Legislature had passed an Act requiring the refund of a fine which had been paid. Quoting from the opinion of Justice Goldthwaite:

> "The principal question is, whether this Act is unconstitutional. By Article 4, Section 11, of the constitution of Alabama the power to remit fines and forfeiture is given to the governor, and by the second article, the powers of the government are divided into three distinct departments—the legislative, executive and judicial, and no one of these departments, or person belonging thereto, can exercise any power properly belonging to either of the others, unless expressly directed or permitted by the constitution. The power to pardon offenses, except in case of treason or impeachment, and to remit fines and forfeitures, being, as we have seen, confined by the fundamental law to the executive branch of the government alone, this power is virtually denied to any other department, and cannot, therefore, be exercised by the legislature. The only question is whether the act referred to is, directly or indirectly, an attempt to remit a fine; for, if it be so, the mode or manner in which it is to be done is entirely immaterial. * * *
>
> "It is impossible for any one to read the first section of the act, without seeing that its purpose is identical with a pardon. * * * It matters not whether the Act is passed before or after the fine is paid. It is the substance of the thing we look at; and certainly it never could have been the intention of the framers of

> the Constitution to prohibit the legislature from remitting a fine, and yet allow that body to accomplish the same result by compelling the fine when paid to be refunded. If that could be done, the prohibition would be nugatory. * * *To sustain this position would be to allow one department of the government to trench upon the powers of another, and to defeat the purpose which the constitution contemplated in confining the pardoning power to one branch of the government, by permitting it to be indirectly exercised by another."

The Act was held unconstitutional and void for the reasons given.

See also:

> Chisholm v. State, 42 Ala. 527.
> Sadler v. Langham, 34 Ala. 322.
> Sanders v. Cabaniss, 43 Ala. 184 et seq.
> State v. Gardner, 43 Ala. 250, 251.
> 8 Cyc., p. 829.
> Weaver v. Lapsley, 43 Ala. 224.
> Titusville v. Keystone, 1 L. R. A., 361 and notes.

The remission of a fine by a judge, in whole or part, is, therefore, a void act and cannot affect the validity of the fine originally fixed. It is the duty of the court to enforce collection of the fine imposed. If any dereliction of the judge defeats the collection of the fine, I am of the opinion that *he is personally* liable to the county for the amount lost.

Yours very truly,

HENRY P. WHITE,
Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Act changing boundaries between two counties is invalid, because both House and Senate Journals do not affirmatively show publication in both counties.

May 4, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

Hon. M. V. Henry, Treasurer of Jefferson County, was charged by the Examiners of Accounts with warrants amounting to $7,537.91, which were considered illegal by the Examiners of Accounts because issued for road work alleged to have been done in Tuscaloosa County. This office is advised that the road on which the work was done lies entirely within that area which was attempted to be transferred from Jefferson County to Tuscaloosa County by the Act entitled, "An Act to change and define the boundary line of Jefferson County between said county and the County of Tuscaloosa," approved September 28, 1915.

Local Acts of 1915, p. 491.

It will be assumed that but for this Act the road would be within Jefferson County. The question is the validity of these warrants.

The House Journal shows publication of notice of this Act in the County of Tuscaloosa, but fails to disclose any publication of notice in Jefferson County. The Senate Journal shows a publication of notice in both counties. The Act, applying only to two counties is local (Constitution 1901, Section 110), and notice thereof should have been given in a newspaper published in each county affected and proof of such publication is required by the Constitution to be spread upon the journal of each House of the Legislature. The courts are required to declare invalid every local law when the journal of either of the houses of the Legislature fails to affirmatively show publication of notice as required.

Constitution 1901, Section 106.

The House Journal failing to affirmatively show that publication was made in Jefferson County, this local Act must be declared unconstitutional and void.

Sellers v. State, 162 Ala. 35, 50 So. 340.

Attention has been called to the discrepancy in the line between the two counties as defined in the published notice and the enacted bill. As the Act is invalid for the reason heretofore set out, it is unnecessary to determine the sufficiency of the notice. The following authorities consider this point.

Mayor of Ensley v. Cohn, 149 Ala. 316, 42 So. 827.
Brame v. State, 148 Ala. 629, 38 So. 1031.
McGhee v. State ex rel. Tate, 199 Ala. 287, 74 So. 374.

In my opinion the warrants are valid if regular in every respect except the objection assigned by the Examiners of Accounts, that is, that the road was transferred from Jefferson County to Tuscaloosa County by the local Act approved September 28, 1915, supra.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

PUBLIC HIGHWAYS:—Local law in force in Jefferson County permits Board of Revenue to make contracts without advertising for bids.

May 4, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

The report of the Examiners of Accounts relative to Hon. M. V. Henry, Treasurer of Jefferson County, classed a large number of warrants as illegal because the contract under which such warrants were issued was a contract for the construction of public roads and was made by the Board of Revenue of the county without advertising as required by Section 11 of what is known as the Goode Act. Acts 1915, p. 573. I am requested to advise as to the legality of these warrants. It will be assumed that the warrants are in all particulars regular unless the failure to advertise as required by said Section 11 invalidates them.

By a local Act approved March 3, 1903, provision was made for the control, working, maintenance, building and

improvement of the public roads and bridges of Jefferson County. (Local Acts 1903, p. 127. Terry's Local Laws of Jefferson County, 626.) Section 4 of this local Act provides among other things that "the power to make all contracts is hereby vested in the Board of Revenue of said County." Section 11 of the same Act authorizes and empowers the Board of Revenue to work, build and maintain the public roads either by contract to the lowest bidder or by working the roads with labor employed by said Board of Revenue. The entire act evidences an intention on the part of the law makers to vest in the Board of Revenue full authority to contract relative to the public roads as that Board in its discretion deems best. There is no provision in this local act requiring advertisement prior to making such contracts. In construing a local road law containing similar and almost identical provision as the Jefferson County law under consideration the Supreme Court held that a compliance with the provisions of Section 11 of the Goode Act was not required, and that valid contracts could be executed without advertising for bids.

Stone, County Treasurer, v. State ex rel. Jett-Muths Const. Co., 85 So. 443.
Board of Revenue of Covington County v. Merrill, 193 Ala. 521, 69 So. 971.

Section 3 of the Goode Act provides that the Act "shall not be construed to repeal either in part or in whole any existing local or special law."

Acts 1915, page 574.

This section prevented the Goode Act from changing in any respect the Local Act of 1903 relating to public roads in Jefferson County. Therefore compliance with Section 11 of the Goode Act requiring advertisement prior to making contracts relative to roads is not essential to the validity of such contracts made by the Board of Revenue of Jefferson County.

Stone, County Treasurer, v. State ex rel. Jett-Muths Const. Co., supra.
Board of Revenue et al. v. Johnson, 200 Ala. 533, 76 So. 859.

As the local law relating to public roads in Jefferson County, Alabama, contains no provision requiring advertisement prior to making road contracts, and as the Goode Act expressly left unqualified and unchanged this local act, the road contracts made by the Board of Revenue were not illegal because of a lack of advertising prior to the making of them. It follows necessarily that the warrant issued in pursuance of such contract are valid and binding obligations.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

SCHOOL DISTRICTS:—City district not being under control of County Board of Education, cannot consolidate with adjacent territory and have County Board petition for school tax election.

May 5, 1921.

Hon. John W. Abercrombie,
Superintendent of Education,
Capitol.

My dear Sir:

Your letter of May 3rd, addressed to the Attorney General, has been handed to my by him with direction that I furnish you the opinion requested.

Your request is as follows:

> "Article 12, Section 5, of the School Code provides for the enlargement of special tax districts by consolidating with any adjacent territory or district which may or may not be levying any special school tax.
>
> "Please advise me if the provisions of this article and section will apply when one of the districts in question is a city system operating under Article 8, Section 1 of the Code. If so, would the consolidated district be subject to the supervision of the county board of education?"

In reply I beg to advise you as follows:

Under the provisions of Article 8, Section 1, Acts of 1919, page 595, all incorporated municipalities of two thousand or more inhabitants are cities within the meaning of

this Act. It is further provided in said section that any town having a population of one thousand and less than two thousand may, in the manner provided under said section, select a board of education of five members to exercise the government and control of the schools in such towns in the same manner as is provided for cities of two thousand or more inhabitants. When any such town of one thousand and less than two thousand has taken such action, the government and control of its schools passes out from under the jurisdiction of the county board of education. The government and control of its schools is then exercised by the town board of education of five members in the same way such government and control is exercised in the case of municipalities of two thousand or more inhabitants.

Under Section 5 of Article 12, Acts of 1919, page 610, it is provided that special tax districts may be enlarged, but this is done by petition of the county board of education. It is clear, I think, that said Section 5 pertains only to such districts as are under the jurisdiction of the county board of education.

By reference to Section 1, of said Article 12, you will find that when a district tax election is desired it is obtained upon request of the county board of education to the court of county commissioners or other governing body and it is there stated that said court shall order an election to be held at the time requested by the said board of education to determine whether or not a special tax shall be levied for public school purposes within any school district in the county under the *control of such board.* It, therefore, appears that unless a school district is under the control of such county board of education, it would not be within the jurisdiction of the county board of education to obtain by such a petition a district school tax election in the district.

Under Section 4 of said Article 12, provision is made to work out a system of local tax units adapted to the needs of the whole country, but the power given therein is to be exercised by the county board of education to fix the boundaries of any school districts within *its jurisdiction* in which it is proposed to levy a school tax.

Construing all these sections together, it is my opinion that said Section 5 of Article 12 applies only to school dis-

tricts which are within and under jurisdiction of the county board of education. It is my opinion that said Section 5 does not apply when one of the districts in question is a city system operating under Article 8, Section 1, of the Code. I think it was not the intention of the legislature to provide for the consolidation of any such city system with district or districts under the supervision or control of the county board of education.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

DEPUTY SOLICITOR OF LAMAR COUNTY:—Compensation under local law of 1903 up to enactment of general law of 1915 not authorized because local law was unconstitutional.

May 9, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Further referring to our opinion of April 20, 1921, relating to a local law of 1903, entitled "An Act to fix and regulate the fees of the deputy solicitor of Lamar County, Alabama" (Local Acts 1903, page 464). We held in this opinion that this local law was repealed by the General Act 1915, page 817, providing for the election of circuit solicitors and for the appointment or election of deputy solicitors and assistant solicitors, and fixing their compensation.

You desire now definite advice as to the effect of this local law on solicitors' fees collected prior to the repeal of this local law.

This local law attempts to compensate the deputy by providing that "he shall receive *all fees for convictions in the county court,* all fees for *conviction in the circuit court* where the defendant appeals from the county court to the circuit court and is convicted, and in all cases *where the defendant demands a jury* in the county court and his case is removed to the circuit court and he is convicted in the circuit court."

As I understand it, the deputy solicitor has collected all fees specified above, as his compensation whether the fee

was earned in the county court by himself, or earned in the circuit court by the circuit solicitor; and that none of such fees have gone into the county or state treasury.

This construction has operated a practical repeal, so far as Lamar County is concerned, of the following provisions of the general law, which were in existence at the time of the passage of this local law.

Section 6634 of the Code provides that the solicitors' fees for convictions in the county court shall be the same as allowed by law for similar convictions in the circuit court; but, they shall receive only one fee in cases that are convicted in the county court, and if the defendant appeals to the circuit court, and is again convicted on the same charge, such fee to be equally divided between the solicitor for the county and the circuit solicitor.

The portion of the fee earned by the circuit solicitor, who is paid a salary by the State, under the express provisions of Section 7792 of the Code, belong to the state, and when collected must be paid into the State treasury.

Section 7802 of the Code provides for the appointment of deputy solicitors to represent the state in the county court. And Section 7803 of the Code fixes the fees and commissions of such deputy solicitors. This last named section expressly allows deputy solicitors to collect and retain for their services the fees and commissions earned by them in the county court during the year, not to exceed five hundred dollars per annum. The residue of such fees and commissions must be paid into the county treasury to the credit of the fine and forfeiture fund.

It is thus seen that *at the time* of the passage of this local law there were full and explicit provisions in the *then existing general law*, governing the appointment of deputy solicitors, fixing their compensation and disposing of fees and commissions earned by them. The general law at that time also disposed of solicitors' fees earned by a solicitor who was paid a salary by the State. The local law does not in *terms* refer to any of these provisions of the general law, but the necessary effect of the construction placed on this local law is to divert from the state and from the fine and forfeiture fund of the county fees which would otherwise go to the State or county. A careful reading of this local law, which imposes no *new* duties on the deputy solici-

tor, shows that the sole purpose of the law was to increase the compensation of such deputy solicitor. The purpose was to give him *all* fees and commissions specified, whether earned by him in the county court or not, and to relieve him from the restrictions as to compensation found in Section 7803 of the Code.

Thus construed, we think this local Act clearly offends Sections 96, 104 (24) and 105 of our Constitution.

Referring first to Section 105 of the Constitution which prohibits any special, private, or local law, except a law fixing the time of holding courts, in any case which is provided for by a general law, etc.

As above shown this local law covers no field except that already appropriated by the then existing provisions of the general law.

Acuff v. Weaver, 86 So. 167, construing a similar statute, is a case exactly in point. In this case, the legislature of 1919, notwithstanding the provisions of the general law of 1915 fixing the salaries of the judges of county courts on a population basis (fixing the salary of Shelby County judge on this population basis at $450.00 per annum) attempted to pass a local law, applicable alone to Shelby County, by which the salary of this particular judge was fixed at $1200.00 per annum. The language of Bricken, P. J., approved by the Supreme Court on certificate, is so apt that we quote his opinion.

> "The constitutionality of an alleged local act approved September 2, 1919 (Local Acts 1919, pp. 93, 94), is one of the questions presented by this appeal."
>
> "By a general act (Acts 1915, pp. 603, 604), the salary of the judge of the county courts of counties of a class that include Shelby County (between 25,000 and 35,000 population) was fixed at $450 per annum. The local act above referred to attempts to increase this amount to $1200. So far as the judge of the Shelby County court is concerned, this is the sole effect of this act. The salaries of the judges of such courts in all other counties of that class remain at the figure by the general law."
>
> "It is apparent that the subject matter of the two acts is substantially the same. The local act is, there-

fore violative of Section 105 of our Constitution which provides that ' * * * local law * * * shall be enacted in any case which is provided for by a general law.' "

Paraphrasing Judge Bricken's language, the sole object of the local law in question is to increase the compensation of the deputy solicitor of Lamar County, while the compensation of all other deputy solicitors is limited as prescribed by the general law. It follows, therefore, that this local act, like the one passed on by Judge Bricken is violative of Section 105 of our Constitution.

See also cases cited in this opinion:

City of Montgomery v. Reese, 149 Ala. 190.
Norwood v. Goldsmith, 168 Ala. 224.

This opinion seems so conclusive as to the unconstitutionality of this act that we simply quote, without extended comment, Sections 96 and 104 (24) of our Constitution.

Section 96 provides:

"The legislature shall not enact any law not applicable to all the counties in the state, regulating costs and charges of courts, or fees, commissions or allowances of public officers."
McFountain v. State, 203 Ala. 330.
Isbell v. Shelby County, 10 Ala, App. 641.

Section 104 (24) of the Constitution provides:

"The legislature shall not pass a special, private, or local law in any of the following cases: (24) Creating, increasing, or decreasing fees, percentages or allowances of public officers."

The local act in question does not come within the exception announced by Judge Mayfield in State v. Prince. 199 Ala. 449:

"Imposing new and additional duties upon certain officers, and providing compensation to them for performing the same, does not offend the Constitution (subdivision 24 of Section 104) as against increasing the fees of officers by local laws."

As above pointed out, this local act imposes no new or additional duty on the deputy solicitor of Lamar but seeks solely to increase his compensation. This increase being based not only on services already required of him by law, but being based in part on services rendered by another solicitor in another court where he was not even required to prosecute for the state.

We conclude that the local Act of 1903 did not affect or change any of the above cited provisions of the general law, which were in effect at the time of the passage of this local act.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION:—Lot purchased by municipality from private owner is not relieved of taxes due before transfer.

May 13, 1921.

Hon. Leo Leva,
City Attorney,
Selma, Alabama.

Dear Sir:

Your inquiry states the following facts:

On October 1st, 1919, a certain lot in Selma, Dallas County, Alabama, was owned and assessed for taxation by one Miss Peacock. On June 1st, 1920, after this lot had been properly assessed, it was purchased by the city of Selma from Miss Peacock. No question is raised to the legality of the assessment originally made, but the sole objection to paying the taxes regularly assessed on this lot is, that subsequent to the assessment of this lot, it was bought by the City of Selma; and, as no taxes can be assessed against municipally owned property, that the taxes already legally assessed against the private owner of said property cannot now be legally collected.

The very statement of the case discloses the fallacy underlying the objection of the City of Selma. On the 1st of October, 1919, this lot did *not* belong to the City of Selma, but was owned and assessed for taxation by one Miss Peacock. Ad valorem assessments of property are not made for a part of the year, but for the entire year, commencing

October 1st. Whoever owns taxable property on *that* date in Alabama must return same for taxation. This particular property, being owned by Miss Peacock on the date required for the return of all taxable property, was and is subject to taxation under the laws of Alabama, and the lien for taxes attaches to this property.

There is always a possibility that privately owned property may pass into the hands of parties exempt from taxation. This certainly cannot operate to relieve the property or the person from taxes already legally assessed.

Hooper v. State, 141 Ala. 118.

We do not mean to hold that we have a *direct* action against the City of Selma. We simply hold, in accordance with the Hooper Case, above cited, (frequently approved by our court), that the State has a lien on the property bought for the taxes due thereon.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

COUNTY DEPOSITORY:—Court of County Commissioners has discretion to reject bids of banks for handling county funds, and to appoint a county treasurer.

May 13, 1921.

Hon. Chas E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

Your letter of April 24, 1921 contains the following statement and inquiry:

> "A state bank filed its bid proposing to pay 4 per cent interest on average daily balances of the county. Instead of accepting this bid the court of county commissioners designated an official of another bank as treasurer at an annual salary of one thousand dollars per year. Was not the Court of county commissioners compelled to accept the bid of the bank?"

It is clear that it was the intention of the Legislature to abolish the office of county treasurer and create a

contractual agency to perform certain of the duties formerly required of such officer, that the county might receive the financial benefits to be derived from saving the salary or compensation of the treasurer and also from securing interest on the average daily balances of its deposits.

Compton v. Marengo County, 203 Ala. 129. 82 South, 159.

The act entrusted to the Court of County Commissioners the power of contracting relative to handling county funds. Those provisions of the Act (Acts 1915, page 348,) pertinent to this authority are as follows:

> "The said board of revenue or court of county commissioners shall from sealed bids, place the county funds, the *bids being opened on the first Monday in December* of each year, with such incorporated State or national bank in the several counties, as offers the highest rate of interest to the county on daily balances of bank deposits, such placing of said county funds to be for the period of the following calendar year. * * * * * * Provided, however, that if the board of revenue or court of county commissioners are unable to designate any depository for the county funds in their county by reason of their inability to secure from any bank within its limits terms for the handling of the county funds as provided in this act, *satisfactory to such boards of revenue* or *courts of county commissioners*, then such boards may designate some individual who may act as treasurer of such county under such terms and conditions as may be fixed by said boards of county commissioners or boards of revenue."

Doubtless the legislature realized that the interest offered on the deposits was not the only consideration entering into determining the proper agency to handle county funds, and therefore, left the determination of the matter to the discretion of the court of county commissioners without specifying such terms as the court is compelled to accept. If the terms offered by the bank were not satisfactory to the court of county commissioners, then the court had a right to refuse the bid of the bank and designate a person to act as treasurer at a salary. It has been held that when

the court of county commissioners is authorized to contract that the exercise of its discretion cannot be controlled and its acts in such matters cannot be impeached except for fraud.

Talley v. Commissioners' Court of Jackson Co., 175 Ala. 644; 39 South. 167.

Whether or not the action of the court of county commissioners was vitiated with fraud is a question of fact. The presumption is that officers act to the best interest of their county and that their action is free from unfair dealings.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COURT OF COUNTY COMMISSIONERS:—May not transfer general funds to road fund when outstanding obligations, preferred claims, or mandatory appropriations from general fund, are unpaid.

May 13, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of the 9th instant addressed to the Attorney General has been received. The letter requests an opinion upon the matters therein inquired about, and such request has been referred to me by the Attorney General with direction that I furnish you such an opinion. Your inquiry is as follows:

"Where a county, through its board of revenue, has not made the provisions required by law for tick eradication and where its receipts of taxes levied for special road, bridge and court house purposes have been subjected by an order of the Federal Court to pay interest and provide a sinking fund for the payment of certain bonds and other obligations authorized and issued by the county for said special purposes, has the board of revenue the authority under the law to issue road war-

rants against the general fund and thereby bring up the indebtedness it is allowed to incur, preventing by such operation the creating of a debt against the general fund for the purpose of tick eradication for the provision of which work a duty is made obligatory on the board of revenue?

"Has the board of revenue any authority of law to obligate the general fund to the payment of road debts unless there is a surplus over what is necessary to meet all outstanding obligations or required obligation against the general fund?"

It is plain that under the Act of the Legislature approved February 7, 1919, contained in General Acts 1919, pages 29-32, it is made mandatory upon the county commissioners or board of revenue of each county in Alabama to make the necessary appropriations to provide for tick eradication in such county in the manner prescribed in such Act. The language of Sections 2, 4, and 9 of such Act plainly indicates that such duty is not optional but is mandatory. If this language were not sufficient, however, the fact that under Section 12 of the Act, it is made a misdemeanor for the members of the county court of commissioners or county board of revenue to fail or refuse to comply with the requirements of said Sections 2, 4, and 9 of the Act, and the further fact that under Section 13 of said Act it is provided that such court or board may be compelled to make such appropriation or provision to execute said law in good faith, would indicate beyond any question that the duties enjoined upon the court of county commissioners or board of revenue by this act are mandatory.

Under Section 4 of the Act approved September 22, 1915, Acts of Alabama of 1915, page 574, the court of county commissioners or board of revenue is authorized to transfer to the road fund of the county funds out of the general fund of the county only when there is a surplus of such general fund.

It must affirmatively appear of record that there is a surplus in the general fund before any such transfer of funds can be made from the general fund to the road fund.

Mims, Treasurer, v. Stallworth, 180 Ala. 511; 61 South. 811.

It is plain, I think, that there cannot be said to be a surplus in such general fund until all preferred claims against the county, and all appropriations which the law makes mandatory, have been paid, or adequate funds have been set aside out of the general funds sufficient to meet all preferred claims and all such appropriations which are mandatory and then if after this has been done, a surplus remains the court of county commissioners or board of revenue might lawfully transfer any such surplus to the road fund to be used as provided under said Section 4 of the Act approved September 22, 1915.

The fact that the funds belonging to, or accruing to the fund for special roads, bridges, and court house purposes have been subjected to an order of the Federal court to provide a sinking fund for the payment of bonds and other obligations authorized and issued by the county for said special purposes, does not affect the principle above stated.

It is plain that if a court of county commissioners or board of revenue could lawfully transfer funds out of the general fund to a special fund, according to their own pleasure, or even according to their own judgment, when such preferred claims or such mandatory appropriations had not been paid or provided for out of such general fund, such court or board would thereby be able to set at naught the plain, expressed law and public policy of the state.

It, therefore, follows, from what is stated above, that such court or board is not authorized by law to obligate the general fund of the county nor to subject it to the payment of road debts unless there is a surplus over what is necessary to meet all outstanding obligations against such general fund and all preferred claims and mandatory appropriations required to be provided out of such general fund.

Yours very truly,

HUGH WHITE,
Assistant Attorney General.

CHILD WELFARE DEPARTMENT:—Under direction of the Commission, additional workers may be employed besides those named in the general appropriation bill, with compensation fixed by the Commission.

May 14, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Montgomery, Alabama.

Dear Mrs. Bush:

You have requested this department to advise you regarding the salary paid Miss Augusta B. Martin as deputy child labor inspector.

The salaries of "two field agents in the Child Welfare Department" are fixed by the act approved September 30, 1919 (Acts 1919, page 993), at $1,500 per year. The act fixing the compensation of state employees (Acts 1919, page 1010) provides for "two assistant inspectors," at $1,500 per year. At the time these acts were passed, your Department was newly established, and the scope of your work has been extended so that your force now includes several assistants whose places were not provided for in the salary-fixing bill or the appropriation bill. However, you have an appropriation of $30,000 a year, expended under the direction of the Commission, and the Commission is given power to select employees and fix their compensation. (Acts 1919, page 696.)

Under this authority, the Commission appointed Miss Martin to the position of child labor inspector, at a salary of $1,650 a year, on December 6, 1919, and later raised this to $1,800 a year, on October 1, 1920. The Commission had full power to make this appointment, though this left vacant one of the two positions as "field agent" or "assistant inspector."

Yours very truly,

BERNICE SUMMERS,
Assistant Attorney General.

FUGITIVES FROM JUSTICE:—Offer of reward holds good for five years only.

May 16, 1921.

Mr. W. A. Darden,
Private Secretary,
Capitol.

Dear Sir:

I am returning herewith letter inquiring about reward offered for a murderer whose crime was committed fifteen or twenty years ago.

In the absence of statute to the contrary, a reward for a murderer might be claimed and received after the lapse of a number of years, as the statute of limitations does not bar prosecution for a capital crime, and the murderer could be tried, if arrested, regardless of the time intervening between the crime and the arrest.

Code Section 7344.
34 Cyc. page 1742.

However, there is an Alabama statute limiting the time for claiming rewards to five years from the date of the proclamation, and this statute has been in force for more than twenty years.

Code Section 6939.
Acts 1883, page 34.

If any reward were offered at the time, it has now lapsed. A new reward could be offered, in the discretion of the Governor.

Yours very truly,
BERNICE SUMMERS,
Assistant Attorney General.

STATE BANKS:—Directors must be owners of beneficial as well as legal title to certain amount of stock.

May 16, 1921.

Hon. H. H. Montgomery,
Superintendent of Banks,
Capitol.

My dear Sir:

Your letter of April 20th addressed to the Attorney General asking for an opinion upon the matters therein in-

quired about has been received by him and referred to me with direction that I furnish you such opinion.

Your inquiry is as follows:

> "You will note by referring to the General Acts of Alabama of 1919, page 844, that every director of a bank or trust company shall be the owner and holder of shares of the bank to the extent of at least two hundred par value, etc.
>
> "There is a bank under my supervision which is served by several directors, who own no stock in their own names, but claim that they are qualified to act as directors for the reason that they are trustees of an estate which owns a large amount of stock of the bank in question. The stock was issued and is held in the names of the several trustees.
>
> "Will you please, therefore, advise me if in your opinion, they are complying with the law as shown in the section above mentioned?"

In reply I beg to advise you as follows:

Unless it is required by the charter or by-laws of a corporation, or by statute, there is no rule of law requiring a director of a corporation to be a stockholder.

14 Corpus Juris, 68.

Where the charter of a corporation or a statute requires simply that a director must be a stockholder, or the owner of a certain number of shares of stock, under the great weight of authority, beneficial ownership is not necessary. If a person holds the legal title to stock he would be eligible in such cases to be a director.

14 Corpus Juris, 68.
Karde Company v. Adams 231 Fed. 950.
People v. Lihme 269 Ill., 351; 109 N. E. 1051.
Casper v. Kaltzimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754.

In the case last cited it is said "a rule requiring that the equitable or beneficial interest in the stock should be in a person in order to render him eligible as an officer would exclude all trustees from acting as corporate officers and in a large measure debar them from investing trust funds in

corporate enterprises because they could not adequately protect such funds by participating in the active management of the business."

Where the charter or article of association of a company required a director to be qualified by holding shares "in his own right" it was held by the chancery court of England that such requirement did not require that the director be the beneficial owner. Under such requirement, however, it was held in that case that such director should hold in his own right, rather than in the right of some one else and that holding in a *representative character* would not do, and that he must be a person who holds shares in such way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares.

Sutton v. English, etc., Produce Co. (1902) 2 Ch. 502.

It has been held that a bona fide holder of stock, may be one who holds it upon a trust and that such holder of stock would be eligible as a director where the statute required that a director must be a "bona fide holder of stock."

In Matter of Election of St. Lawrence Steam Boat Company 44 N. J. Law, 541.

The corporate records of the corporation are prima facie, but not conclusive evidence of a stockholder's qualification to be a director.

Same Case, 44 N. J. Law, 541.

Certain determination of the legislative intent in the Alabama statute is more difficult because the word "owner" when used with reference to stock in a corporation is generally used synonymously with the word "holder."

4 Words and Phrases, 3319.

From the statement contained in your letter as to the directors here in question, I assume that since they hold such stock as trustees of the estate, they hold the legal title only and that the beneficial interest in the stock is in the heirs or devisees of the estate. I assume also that the stock on the stock book or records of the bank stands in the names of such persons, as trustees. However, if they own the

legal title only to the stock, I do not think it is material under our Alabama statutes whether the stock stands in their individual names or in their names as trustees upon the books of the bank.

44 N. J. Law, 541, supra.

Finally, the question whether a person under the act, Acts of Alabama 1919, page 844, is eligible to be the director of a bank or trust company doing a banking business in Alabama, if he holds legal title only to stock in such bank or trust company, and the beneficial interest in such stock belongs to other persons, must be determined by arriving at the intention of the Legislature as shown in the Act with respect to this question.

That part of the Act in regard to this matter reads as follows:

> "Every director of a bank, or a trust company doing a banking business, shall be the owner and holder of shares of stock in the bank or trust company, having a par value of at least two hundred ($200.00) dollars, and every such director shall hold such shares in his own name, unpledged and unincumbered in any way, except statutory lien which might attach in favor of such corporation."

In Section 2 of this Act it is further stated in this behalf, that such director must make oath "that he is the owner in good faith of the shares of stock of the bank or company required to qualify him for such office standing in his own name on its books and that one of such oaths shall be filed with the superintendent of banks."

It must be noted in the first place that the act requires that such director shall be not only "holder of stock," a stockholder, but that he must be the "owner" of such stock. If the Legislature had intended that one who merely was a "holder of stock," a stockholder, that is a person who had legal title to the stock or who stood on the stock books of the bank as a stockholder, should be eligible as a director, there was no use in stating in the Act that he must also be the "owner" of the stock. And although as cited above, the word "owner" when used in connection with stock in a corporation generally means the same thing as "holder"

of stock, still the word "owner" may have, and generally does have, a more comprehensive meaning. And here, since the act goes further and says that such stock must be held "in his own name, unpledged, and unincumbered, except the statutory liens," and that the director must make oath "that he is the owner in good faith of such stock," I think we are not only authorized to hold, but that a reasonable construction of the Act requires us to hold that the word "owner" as here used, was intended to be given what is its more usual and common meaning, which is that of being the possessor of the legal title and entire interest.

If there were any doubt about the matter growing out of the judicial construction which has been given to the word owner when used in such context as that in the present instance, I think such doubt is removed when we consider the further requirement of the Act, that the director must hold such shares "in his own name, in good faith unpledged and unincumbered in any way, except statutory lien which might attach in favor of such corporation." The statutory lien here referred to is that given to every corporation for any debt or liability incurred to it by a stockholder under Section 3476 of the Code of 1907. This lien as shown by the statute is a general lien which exists in favor of every corporation in Alabama, and the fact that it is excepted here in no wise affects the principles upon which this opinion is based.

If a director holds and owns the legal title only to stock and the beneficial title therein belongs to some other person, he cannot be said to own or hold the stock "unincumbered." He certainly cannot transfer or convey an "unincumbered" title to such stock. If he could not convey an "unincumbered" title thereto, he certainly could not be said to "own and hold it unincumbered." The outstanding beneficial interest therein would be an incumbrance upon his title.

4 Words and Phrases, pages 3519-3522.

In trying to arrive at the legislative intent in this statute, we should also consider other statutes of Alabama enacted for the regulation of banks and trust companies doing banking business in this State.

The statutes show without any doubt that it has become the fixed public policy of the state to recognize that the

people of the state are greatly concerned in the rules or regulations under which such banks and trust companies shall handle their money, that is the money of the people. Every such bank or trust company is a trustee of the people's moneys. In the present act, I think it was the intention of the legislature that every person who should be elected as a director of such a bank or trust company must have at least some direct personal pecuniary interest in the affairs of the bank. I think, it was the intention of the statute that such pecuniary interest should be real and absolute and not nominal. The fact that the amount of stock he is required to hold is small is not sufficient to overcome this view.

This view is given as the one which has been entertained by some of the courts even where the statute or charter provisions of the corporation required simply that a director must be the owner and holder of so many shares of stock.

Casper v. Kaltzimmers Mfg. Co., supra.

For the reasons stated herein, it is my opinion that the statute, General Acts of Alabama of 1919, page 844, requires that a person must be the owner of the beneficial interest in stock, as well as the legal title thereto in order to be eligible for election as a director of a bank or trust company doing a banking business in this state. If the directors named in your letter cannot qualify in this respect, then, in my opinion, they are ineligible to serve as such directors.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

BIENNIAL ASSESSMENTS:—Right of tax payer to appeal from tax adjuster's valuation for second year, where change in value has occurred for causes named in statute.

Hon. Jno. S. Mooring, June 4, 1921.
Chairman, State Tax Commission,
Capitol.

Dear Sir:

Your letter of the 2nd instant addressed to the Attorney General asking his opinion upon the matters therein in-

quired about has been referred to me with direction that I furnish you such opinion.

Your inquiry raises the question of the right of a taxpayer in Alabama to appeal from the valuation put upon real property by the tax adjuster for 1921, when the tax adjuster has fixed for 1921 the same valuation upon such real property as he had previously fixed after a personal inspection thereof for the year 1920. In other words the tax adjuster after personal inspection of real estate for year 1920, puts the valuation upon the real estate which under the provisions of Section 84, Acts 1919, page 311, remains the taxable value of such real estate for a period of two years unless the valuation thereof by some proceeding for that purpose begun during the tax year 1920 has been changed.

It must be noted, however, that the determination of whether the valuation of the real estate by the tax adjuster during the year 1920 shall remain taxable value of such property for a period of two years depends upon several things, namely:

First: A personal inspection of the real estate.

Second: "Whether there has been a change in the value of such real property or the building, structures, or improvements thereon caused either by the destruction of or damage to said buildings, or by the erection or construction of new buildings, structures, or improvements or by the removal of minerals from said lands, or by the removal of turpentine from the timber of said lands, or by cutting the timber therefrom," in which event the assessment shall be increased or reduced to the extent only of the increase or reduction in the value of such real property by reason of the changes above named.

Section 84, Acts 1919, pabe 311.

The record of the taxpayer's assessment for the year 1920 and the valuation of his real property thereon by the tax adjuster for the year 1920 is not conclusive of these questions upon which depends the determination of the question as to whether the valuation of such real estate for taxes shall remain the taxable value thereof for a period of two years.

Let us assume for illustration, that the taxpayer still owns in fee simple the lands of the same identical descrip-

tion in 1921, that he assessed for taxes for the tax year 1920, but that since he assessed such property for the tax year 1920 a dwelling house or barn situated on such real estate has been destroyed by fire. Of course when he lists his property for taxes for year 1920, in this case his tax list would show the absence of such building destroyed by fire which was listed on his assessment for year 1920. The question in this case then would be as to sixty per cent of the valuation of his real estate without such building. The valuation fixed by the adjuster would be in effect a new judgment by him which the taxpayer would have the right to appeal from as he had originally when the valuation was fixed for the tax year 1920. In the case above used for illustration, let us suppose that instead of a building having been burned upon such real estate since it was assessed for 1920, and prior to its being listed for taxes for 1921 by the taxpayer that the taxpayer had sold valuable mineral from such land or valuable timber therefrom and that such mineral and timber had been removed from his land although he still owned the fee of the land after such mineral or timber had been removed. When he lists such real estate for taxes for 1921 the description given by him would be the same perhaps as the description he had given for tax year 1920 and yet there would have been made meantime a change "in the value of such property by the removal of mineral from said lands or by cutting the timber therefrom." When the taxpayer's list came before the tax adjuster for a valuation of such real estate on the face of the tax list it would appear the same real estate which he had valued for 1920, but in fact it would not be.

Let us assume that the tax adjuster for this reason set down the same valuation for the year 1921 which he had put upon this property for the year 1920. It is manifestly unfair to take the position that the taxpayer would not have the right to have adjudicated according to law the changed valuation of his real estate because of the removal of such timber or minerals therefrom. The Act of 1919 has not undertaken to deny him the right of appeal in such case and if it had made such attempt, it would have been unconstitutional and futile.

Illustrations could be multiplied for the purpose of showing that such change of value as is referred to and described in said Section 84 of the Revenue Act had occurred between

the time the taxpayer listed his property for tax year 1920 and the time he listed for tax year 1921, and yet the description showing his property on the tax list had still remained the same. In my opinion the law has not denied to the taxpayer a right of appeal from the valuation fixed by the County Tax Adjuster for the year 1921, no matter whether the taxpayer's tax list describes or sets out the same identical property which he listed for the year 1920 or not.

However, if upon such appeal it is shown that the real estate shown by the taxpayer's list for the year 1921 is the same as shown by his tax list for tax year 1920 and there has been no "change in the value of such real property, or the building, structures, or improvements thereon caused either by the destruction of or damage to said buildings, or by the erection or construction of new buildings, structures or improvements or by the removal of minerals from said lands or by the removal of turpentine from the timber of said lands, or by cutting the timber therefrom." then and in that event the valuation which was placed by the tax adjuster for the year 1920 is conclusive as an adjudication of the taxable value of such real estate for the year 1921 under provisions of said Section 84 and a court of county commissioners would not have authority or jurisdiction to change such valuation.

If any such change in the value of such real property had occurred as is above stated in the quoted part from said Section 84, then the question of valuation would be open for determination to the extent only of the increase or reduction in the value of such real property as had taken place by reason of any of said changes above named.

Section 84, Acts 1919, page 311.

In my opinion, the determination of the taxable value of such real property by the county tax adjuster for the year 1921 is the exercise of a judicial function and is not merely a ministerial act. To hold that to be a mere ministerial act would imply that the law assumes that it must be accepted in the absence of any change shown in the taxpayer's real estate as listed in 1921 from that listed for the tax year 1920 that no change in such value has occurred. I do not think that there is any assumption or presumption of law to this effect.

It is my opinion, therefore, that the taxpayer has a right of appeal from the valuation fixed by the tax adjuster upon his property for the tax year 1921 whether the list thereof shows any different property or not from that listed for the tax year 1920. However, as above stated, upon such appeal the inquiry is confined to the question of the extent only of the increase or reduction in the value of such real property by reason of any such change having taken place as is described in said Section 84.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

PREFERRED CLAIMS AGAINST COUNTY:—Fees of special counsel employed by Commissioners' Court are not preferred claims.

June 22, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your inquiry as to whether or not the claim of an attorney for legal services rendered on the order of a commissioners' court is made a preferred claim by Acts 1919, page 68, is received.

Without entering into the question whether the act referred to is changed or interpreted by the subsequent acts of the legislature, printed on pages 860 and 1110 of the Acts of 1919, I am of the opinion that Acts 1919, page 68, does not make such a claim a preferred one for the reason that the subject matter of the act is not expressed in the title, and if it were, the act would be further obnoxious to Section 45 of the Constitution, as it would contain more than one subject.

The case of State ex rel. Troy v. Smith, 187 Ala. 411, presented a similar question. Section 561 of the Code which provided that the Governor might "employ a stenographer and messenger to the chief executive office" was amended by an Act of the Legislature, Acts 1911, page 369, so as to authorize in addition the employment and compensation of special counsel. An attorney duly employed by the Gov-

ernor sought by mandamus to compel the auditor to pay the agreed compensation. It was objected that the amending Act was violative of that part of Section 45 of the Constitution which provides: "Each law shall contain but one subject which shall be clearly expressed in its title." The Supreme Court sustained this objection, declared the Act of 1911 unconstitutional and affirmed a judgment denying the writ, saying (page 421):

> "The title of the bill to amend Section 561 gave notice to the legislature and to the people that the subject of that section was to constitute the subject of the act. Can it be said consistently that the legislative mind, as well as that of the people, being directed thereby to said section, which provided merely for the employment of a stenographer or messenger to the chief executive office, would be fairly apprised that the amendatory act also provided for employment of services of a professional character, as of counsel, by the chief executive. We are of the opinion that the question carries with it its own negative answer."

Paraphrasing this language of the Court, it seems proper to say: The title of the 1919 Act (Acts 1919, page 68) to amend the 1915 Act (Acts 1915 page 548) gave notice to the legislature and to the people that the subject of the 1915 Act was to constitute the subject of the amendatory 1919 Act. Can it be said consistently that the legislative mind, as well as that of the people, being directed thereby to the 1915 Act which provided merely for *additional duties to be performed by circuit and county solicitors and solicitors of courts of record,* would be fairly apprised that the amendatory act also provided that *the claim of special counsel for compensation should be a preferred claim?* I am of the opinion that the question carries with it its own negative answer. See also State ex rel. Coxwell v. Mims, 197 Ala. 356.

In the absence of other grounds for preferment, this was not a preferred claim, and its payment as such was unauthorized by law.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

DEPUTY SOLICITOR OF WALKER COUNTY:—Change in salary based on population takes effect from date of announcement by census director.

June 22, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol, Montgomery, Ala.

Dear Sir:

This will acknowledge receipt of your inquiry dated June 4, 1921, with reference to the salary vouchers of C. K. Wiggins, County Solicitor, Walker County, covering periods from January 1, 1920, to April 15, 1920, and from April 15, 1920, to November 1, 1920.

The facts in this case seem to be that Mr. Wiggins was county solicitor on January 1, 1920, when the census was taken as required by law (Compiled Statutes, 1919 Supplement, Section 4388 H), and that on June 2, 1920, the population of Walker County was announced to have been 50,593 as of January 1, 1920.

By Section 5 of the Acts of 1915, page 817 at 820, it is provided that county solicitors shall be paid an annual salary, in equal monthly installments, of $1,200.00 in counties having more than 45,000 population and not exceeding 75,000 population, which salary "shall be in lieu of all fees or compensation allowed by law to such county solicitor, and the payment of said salary to be by warrant of the Probate Judge of the County drawn on the treasurer thereof, *the population to be determined by the last Federal census preceding the time of the payment of the salary.*"

Previous to the 1920 census Walker County had been placed in the classification of counties having 30,000 and less than 45,000 population, and the salary paid to the county solicitor was $900.00 per annum. Upon the advice of the Attorney General (letter, January 26, 1921, to Hon. Malcolm E. Nettles, Jasper, Ala.), the county solicitor presented voucher for back salary at the rate of $25.00 per month covering the period from April 15th to November 1, 1920, and upon receiving later advices from the director of the Census declaring that the census took effect on January 1st, the county solicitor presented additional voucher covering the period from January 1, 1920, to April 15, 1920. Both these vouchers have been paid and their validity is now in question.

I am called upon by this state of facts, by your request, to determine at what time the Federal census of 1920 took effect within the meaning of Acts 1915, page 817, which regulates the salaries of county solicitors. After a careful review of the authorities, and with special reference to the opinion of the Hon. Henry P. White, Assistant Attorney General, rendered in a letter dated April 14, 1921, I am of the opinion that the Federal census took effect in Walker County, so far as the Act regulating the salary of county solicitors is concerned, on June 8, 1920, the date of its publication.

Mr. Wiggins is entitled to salary at the rates of $900.00 per annum up to June 8, 1920, and at the rate of $1,200.00 per annum after that date.

No provision is made in the Act of March 3, 1919 (U. S. Compiled Statutes, 1919 Supplement, Sections 4385 to 4419) under which the last or 14th decennial census was made, for a date on which it should become effective. "In the absence of a statute requiring any formal action by the census board or the legislature, a census goes into legal effect, as such, on its compilation and *publication* by the census superintendent or Board."

11 C. J. 71.
Wolff v. Morehead, 98 Minn. 113.
Greene v. Narragansett, 29 R. I. 380.

You will note from the underscored portions of the Act of 1915, hereinbefore set out, that the salary of the county solicitor is to be paid by warrants of the probate judge, who is to determine the population by the last Federal census preceding the time of the payment of the salary. This provision or the act very clearly shows that the Legislature contemplated that the effective date of the Act should be the date of the publication of the census. The probate judge of the county must have something to guide him in drawing a warrant for the solicitor's pay, and until a new census has been published and made accessible to him, he must be guided by the old census. The confusing consequences of interpreting the statute to make the date of the taking of the census the date from which the new salary shall be drawn are obvious. Suppose the population of Walker County had decreased; the warrants drawn by the

probate judge for the salary on the basis of $900.00 a year during the period between the taking of the enumeration and publication of the census would be too large, and yet the probate judge would have been setting entirely within the authority of the statute in drawing the warrant. Would anyone suggest that he be held responsible for the difference? As I see it, the legislature intended that a solicitor acting for 45,000 or more people should have a larger renumeration than one acting for fewer people, but for convenience in determining what was the population of Walker County, they made the published Federal census a standard, and that standard must be adhered to. Walker County probably had a population of more than 45,000 people previous to January 1, 1920, but according to the last Federal census at that time the county did not have so large a population. No greater injustice is done to the county solicitor by refusing to give him the larger salary for the period from January 1, 1920 to June 8, 1920, than was done for a period probably of two or three years previous to January 1, 1920. (See also Childers v. Duval, 69 Ark. 336.)

In State v. Shelton, 27 Okla., 322, 111 Pac. 545, the Supreme Court of Oklahoma construed a law which established a Superior Court in every county having a population of 30,000 and a city of 8,000, according to the last Federal census. The Federal census (1910) for the city and County of Tulsa was taken as of April 15th and on July 20th the director of the Census officially determined and declared the population of the county to be more than 30,000 and the city to be more than 8,000. It was held that since the last day for filing petitions for the position of Superior Judge of Tulsa County expired July 3, 1910, at which time the *official determination of the population of the city and county had not been declared* and under the previous census Tulsa County was not entitled to a Superior Court, relator was not entitled to have his petition for nomination as a candidate for judge of such court filed and his name placed on the ballot for the election to be held November 8, 1910. In the absence of a decision on this matter by our own court, this decision of the Supreme Court of Oklahoma, in a case involving almost the identical proposition, is very persuasive.

The former opinion of the Attorney General is obviously incorrect as it rests upon a statute other than that under which the 1920 census was taken.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

DEPUTY SOLICITOR:—Act providing for election of county solicitor in counties of certain population void because local and not properly passed, hence general act governs salary of deputy solicitors.

June 22, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

This will acknowledge receipt of the letter of Hon. J. A. Hankins, Fayette, Alabama, dated May 21, 1921, referred to me by you.

This inquiry presents two questions:

First: Is a county solicitor duly elected under Acts 1919, page 831, to represent a county having the population prescribed by that act as previously announced by the Federal census, entitled to the salary fixed by the Act?

Second: If the election under Acts 1919, page 831, is a nullity, is such county solicitor entitled to receive pay as deputy county solicitor under Acts 1915, page 817 at 820?

Under the decision of the Supreme Court in Reynolds v. Collier, 85 Southern, 456, I am constrained to answer the first question in the negative. From that case it appeared that an Act of 1915, (Acts 1915, page 603), provided that the salary of probate judges in counties having a population of less than twenty-five thousand should be fixed at three hundred dollars per annum, was limited in its application by Acts 1919, page 1114, so that the salary of probate judges in counties having a population between twenty-three thousand one hundred fifty and twenty-three thousand two hundred fifty was fixed at nine hundred dollars per annum. The Supreme Court found that the 1919 Act was in reality a local act, that the required steps preliminary to its passage as a local Act were not taken, that the classification upon which it was sought to be made a general

law was arbitrary and unreasonable, and hence held the Act to be a violation of Section 110 of the Constitution.

The Court said (page 467):

"Under the provisions of the Act of 1915 (page 603), the judges of the county courts were paid different salaries in accordance with the population of the counties, which in every respect it appears was a substantial basis and a proper classification. Under said act the judge of the county court of Chilton County received $300 per annum while by the terms of the act here considered the salary is fixed at $900 per annum. There can be no pretense whatever either of logic or common sense why in those counties under 25,000 population, and yet lacking 150 or 200 population of coming within the figures as arbitrarily fixed by this act, the county court judges should still receive only $300 per annum (Acts 1915, page 603), while in this particular county the judge of the county court should receive $600 additional. The classification as to population has not the semblance of necessity, reason, or substantial merit upon which to stand. It was merely arbitrarily fixed so that under the guise of a general law this local legislation was enacted."

85 South, 467.

Substituting the figures of the present case for those in the opinion quoted, it seems almost mathematically demonstrable that Acts 1919, page 831, is unconstitutional. In the present case there was a classification by the 1915 act of counties having less than twenty thousand population, out of which the Legislature of 1919 carved an exception for counties having a population between eighteen thousand one hundred twenty-five (18,125) and eighteen thousand nine hundred (18,900). Can it be maintained that this classification is not equally arbitrary, and equally obnoxious to Section 110 of the Constitution.

Second: The Act of 1919 being a nullity, the 1915 Act is unaffected by it and the solicitor's salary should be paid under it, provided of course he comes within its provisions.

Very truly yours,

MARION RUSHTON,

Special Assistant Attorney General.

PUBLIC SERVICE COMMISSION:—Consulting engineer is not officer but employee of State, and may be paid both retainer and fees.

June 30, 1921.

Hon. A. G. Patterson,
President, Alabama Public Service Commission,
Capitol.

Dear Sir:

Your letter of the 29th instant addressed to the Attorney General in which you request his opinion in regard to the vadidity and binding force of the contract of employment of Mr. I. F. McDonnell, Consulting Engineer, by the Alabama Service Commission has been received. Your inquiry has been referred to me by the Attorney General with directions that I furnish you an opinion upon this subject of inquiry.

It appears from your letter that the agreement of the Public Service Commission with Mr. McDonnell is as follows:

> "Mr. I. F. McDonnell is employed by the Alabama Public Service Commission as consulting engineer for the commission, at a monthly salary, or retainer fee, of $75.00 per month. The contract with Mr. McDonnell provides that the $75.00 payment shall cover all matters of consultation, including attendance at the regular monthly meeting of the commission and such special meetings as the commission may desire him to attend. In addition to the above amount, the commission has contracted to pay Mr. McDonnell such additional sums for specific services performed by him under direction of the commission in the matters of valuations, appraisals and investigations made for the commission as may be agreed upon when such service is performed."

Your question is whether this arrangement is legal and if the State Auditor is authorized to pay for services performed by Mr. McDonnell under either or both of the above stated provisions.

Section 3 and Section 14 of the Act approved October 1st, 1920, General and Local Acts of Alabama Special Session 1920, pages 39, 43, authorizes the commission to em-

ploy a consulting engineer to aid the commission in carrying out the provisions of said Act and in performing the duties and exercising the powers conferred by law upon the commission. Under said Section 14 the commissoin is expressly authorized to employ such experts as it may deem necessary to aid it in making a valuation of the property of a public utility. Such power is conferred, however, in broad and general terms under said Section 3. When both of these sections are taken in connection with the entire Act, it is plain that the commission is given authority to employ a consulting engineer, upon consultation with and the approval of the Governor, to perform such work as would be performed by Mr. McDonnell, as stated in your letter.

Any person employed by the commission for such service as that herein stated is not an officer of the State, but is merely an employee. The said Act does not put any restriction or limitations upon the compensation to be paid such engineer, except that it is subject to the approval of the Governor. The Act contemplates, of course, that all such contracts of employment, as well as other expenses incurred by the commission under the provisions of the Act, shall be kept within the appropriation made for such purposes in Section 4 of the Act. It was within the powers of the legislature to give authority to the commission to emply such expert assistants. The engineer so employed, as above stated, is not an officer, but is a mere employee. The amount of compensation, and the method of compensating such employee, were matters not fixed by the Act, but delegated to the commission by the legislature, and it was competent for the commission to make with Mr. McDonnell such contract of employment as is stated in your letter.

In my opinion, therefore, the arrangement made by the commission with Mr. McDonnell is legal and the state auditor is authorized to pay him for services rendered under such agreement, when the amount due Mr. McDonnell has been properly certified to the state auditor as required by law.

Yours very truly,

HUGH WHITE,
Assistant Attorney General.

COUNTY FUNDS:—May not be granted to charitable institutions not controlled by some branch of the government.

July 5, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My dear Sir:

Mr. M. V. Henry, Treasurer of Jefferson County, has requested this office to pass upon the legality of certain grants or donations of money by the Board of Revenue of Jefferson County to the University Free Dispensary, Childrens Aid Society, Elizabeth Duncan Memorial Association, the Neighborhood House, the Octavia White Home, and the Anti-Tubercular Association.

The answer to this inquiry necessitates a construction of Section 94 of the Constitution of 1901, which is as follows:

> "The legislature shall not have power to authorize any county, city, town, or other subdivision of this State to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in any such corporation, association or company, by issuing bonds or otherwise."

The Institutional provision was intended to prevent donating or granting the funds of a county to individuals, associations, or corporations not under public control. Public funds are almost entirely secured by levying taxes, and should not be devoted to private purposes. Any association or corporation which is not entirely controlled and accountable to the State or some subdivision thereof and which is not under legal as distinguished from moral obligation to serve the public, is private regardless of the benefits it bestows on the community it serves, and regardless of the fact that it is a charitable and benevolent institution. A grant of public funds to such an institution or corporation is prohibited. The fact, however, that the institution is a corporation separate for a governmental subdivision of the state does not place it within the inhibition of this constitutional section if it is public in its purposes, entirely controlled by the State, or some subdivision

thereof, accountable to the public for the funds granted and is under legal obligation to serve the public.

Farnham v. Mimms, County Treasurer, 174 Ala. 233, 57 South. 466.
Southern Railway Co. v. Hartshorn, 162 Ala. 491, 50 South. 139.
Rogers v. White, 14 Ala. App. 482, 70 South. 994.
Garland v. Montgomery County 87 Ala. 223.
Sheppard v. Dowling, 127 Ala. 1. 10 R. C. L. 712 Sections 22, 23, 24, and 25.
Winston's case, 5 Stew. & Port. 25.

The University Free Dispensary is owned and controlled by the University of Alabama, a public corporation (Winston's case, supra) and devoted entirely to the discharge of its legal duty to serve the public. It follows that appropriations of public funds to the University Free Dispensary are not prohibited by this constitutional section. Whether or not the funds going to the other institutions mentioned are *grants*, or whether or not they are private associations are questions of fact, which this office has not undertaken to determine. The principle herein announced is of easy application.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

TAX ON SHARES OF CORPORATIONS:—Lien is enforceable against owner of stock, and where corporation discontinued after assessment still has property collector may levy on shares or pro rata interest of owner.

July 12, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My dear Sir:

This office is in receipt of your two inquiries of June 13, 1921, with reference to the collection of the tax on the shares of corporations which, after the assessment of 1920 and prior to its collection, have discontinued business. In the first case the corporation discontinued business leaving

no tangible assets, and the question is: can the tax collector levy on other property of each shareholder for the tax due on his number of shares? In the second case, the corporation on the discontinuation of business disposed of property (presumably to creditors or purchasers) which can be identified, and the question is: can this property formerly belonging to the corporation wherever found be seized on by the tax collector to satisfy the tax due on the shares of stock? These two questions involve similar considerations and will be answered together.

The tax on the shares of corporations is levied by Section 12 of the General Revenue Act of 1919, (Acts 1919, page 290). Parts of that section pertinent to the present inquiry are as follows: "Every share of any corporation, except banks or banking associations, shall be assessed and the taxes thereon collected in the county wherein such corporation has its home or chief office in the state, and shall be assessed at sixty per cent of its reasonable cash value to the person in whose name such share stands on the books of the corporation, and not to the corporation." After providing a method for determining the taxable value of corporate shares and requiring certain officers of the corporation to make a return of necessary information as to the names of stockholders, recent sales of stock, and the like, the section further provides that, "the corporation shall pay for the shareholders the tax assessed against his shares, and the amount so paid for any shareholder shall be lien on any interest which such shareholder may have in any property owned by the corporation." "It shall be ground for objection to such assessment of shares that the same is entered upon the assessment books in the name of the corporation." And by Section 14 it is provided if "a corporation or a bank by endorsement upon its tax assessment or otherwise in writing shall agree to pay the taxes, if any, assessed on the shares for the shareholders it need not file a list of such shareholders."

The state's lien for taxes is created by Section 416 of the General Revenue Act of 1919 (Acts 1919, page 449):

> "From and after the first day of October of each year, when property becomes assessable, the State shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of

> all taxes which may be assessed against him and upon each piece and parcel of property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in order named and each of such liens may be enforced and foreclosed by sale for taxes as provided in this Act, or as other liens upon property are enforced."

It thus appears that if the shareholder is the "taxpayer" or person having "tax * * * assessed against him" within the meaning of Section 12, the State (and the county or city in a proper case) has a lien upon each and every piece and parcel of property owned by him under the provisions of Section 416.

That the shareholder is the "taxpayer" and the person against the tax on corporate shares is required to be assessed by Section 12, seems clear from the very plain language of the Act. "Every share of any corporation * * * shall be assessed * * * to the person in whose name such shares stand on the books of the corporation, and not to the corporation." It is true that it is no ground for objection to the assessment that the same is entered upon the assessment books in the name of the corporation, and the corporation is required to pay the tax; but the one provision is simply a waiver of formalities and in the other it distinctly appears the corporation is paying the tax "for" the stockholder and is entitled to a lien to secure reimbursement.

This view is supported by the opinion in the Lovejoy case, ex parte State, 188 Ala. 401, 66 South. 1, where the full bench of the Supreme Court speaking through Chief Justice Anderson in construing a provision of the Code of 1907, which is identical in its essential parts with Section 21 of the General Revenue Act of 1919, said:

> "Section 2082 of the Code of 1907, subdivision 9, provides for the assessment of every share of stock of any corporation therein embraced and, while the as-

sessment must be made by the officer of the corporation, and the tax to be paid by the corporation, it was the manifest purpose of the legislature to levy the tax on the shares of stock and *against the holder thereof,* as distinguished from the corporation itself * * * The tax is, therefore, levied against the share, and, though paid by the corporation, must necessarily come out of the shareholder in the end, as the corporation is given a lien on the share for the tax paid thereon, and unless the value of the shares exceeds the assessed value of the property returned by the corporation there can be no assessment or collection against the share. In other words, a *liability is fixed against the shareholder and the method of enforcing same is provided.*"

I am of the opinion, therefore, that the state has a lien on all the property of the shareholder for the tax due on his shares of stock. This lien runs "from and after the first day of October of each year." Upon delinquency it is within the power and it is the duty, of the tax collector to proceed in such case as the present at once against the other property of the shareholder to satisfy the lien. I therefore answer your first question in the affirmative.

It follows that your second inquiry must be answered in the negative. Section 12 expressly provides that the assessment of shares shall be made to the shareholder (and *not to the corporation*). To quote from the Lovejoy case, supra "It was the manifest purpose to the legislature to levy the tax on the shares and against the holder *as distinguished from the corporation itself.*" Since the corporation is not the "taxpayer," or person having the "tax * * * assessed against him" * * * The state has no lien against it under the provision of Section 416 and it has no lien otherwise derived, for "it is well settled that a tax is not a lien unless it is expressly made so by the law or ordinance which imposes it."

Heine v. Levee, Commissioner, 86 U. S. (19 Wall) 655, 22 Law Ed. 223.

The state has no lien against the property of the corporation for the tax on shares and the tax collector has no power to levy on such property to collect such a tax. The

tax collector is not however, without other effective remedies. Under the statute it is the duty of the corporation to pay this tax "at the source" and this duty may be enforced by assumpsit or other appropriate action.

> Commissioner v. State, ex rel. Fairford Lumber Company, 172 Ala. 242 at 253.

Further, as long as the stock has value, and presumably the stock will have value as long as the corporation has property, an effective mode of procedure is provided by a sale of the stock under Section 211 of the General Revenue Act of 1919, (1919 Acts page 345). And lastly, there is here, as in the first case, a lien upon all the property of the stockholder, which includes, of course, a lien upon his pro rata share of the property of the corporation.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

TAXATION:—Remainderman not liable for taxes due by deceased life tenant.

July 15, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

This will acknowledge receipt of your letter of June 4, 1921, requesting an opinion upon the following state of fact: A is the owner of a life estate in certain real property on October 1, 1920, which was assessed to him. A dies after October 1, 1920, and before the period when the collection of the tax could be enforced by sale. The question is, can this tax be collected by a sale of the property, or shall the tax collector endeavor to collect the amount out of the estate of the deceased?

Section 266 of the General Revenue Acts of 1919 (Acts 1919, page 360), after providing that the judge of probate shall make a deed to the purchaser at a sale for delinquent taxes, provides: "And such deed shall convey to and vest in the grantee all the right, title, interest and estate of the person whose duty it was to pay the taxes on

such real estate, and the lien and claim of the State and county thereto; *but it shall not convey the right, title or interest of any reversioner or remainderman therein.*"

Under date of March 31, 1921, this office, through the Hon. H. P. White, Assistant Attorney General, rendered you an opinion in which it was held that the owner of the life estate is the "person whose duty it was to pay the taxes on such real estate." This position is supported by the decision of the Supreme Court in Gunter v. Townsend, 202 Ala. 150, 79 Sou. 644. It is apparent, therefore, that there is no right to sell real estate for the taxes which should have been paid by the life tenant after the life estate has lapsed by death. Recourse may of course be had against the estate of the deceased life tenant.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

LAW ENFORCEMENT:—Justice of the peace may issue search warrant to be executed in another precinct of same county.

July 18, 1921.

Hon. C. W. Austin,
Chief Law Enforcement Officer,
Capitol.

Dear Sir:

The Attorney General has requested me to reply to your inquiry as to whether justices of the peace in the various counties in Alabama have authority to issue search warrants to search for prohibited liquors, such warrants to be executed in precincts other than the precinct in which such justice of the peace may reside in such county.

Section 7757 of the Code of 1907 defines a search warrant as "an order in writing in the name of the State signed by a magistrate directed to the sheriff or to *any constable of the county* commanding him to search for personal property and bring it before the magistrate." Section 7763 of the Code provides for the issuance of a search warrant by a magistrate, the same to be "directed to the sheriff or to *any constable of the county*," etc.

Acts 1915, page 18, Section 22 relating to search warrants provide for the issuance of search warrants signed

by a magistrate and directed to the sheriff or to *"any constable of the county."*

In the case of O'Meara v. Merritt, 128 Mich. 249. 87 N. W. 197, it is stated that the statutes of Michigan conferred upon the police court the same criminal jurisdiction as was exercised by justices of the peace, and provided that search warrants might be issued by any officer authorized to issue ordinary warrants, and also provided that all search warrants be "directed to the sheriff or any constable of the county." The court in construing these provisions similar to those contained in our statutes, held that the police court had jurisdiction to issue search warrants throughout the county.

The 1915 Act above referred to was construed by the Supreme Court of Alabama in the case of Edmonds v. State ex rel Dedge. 199 Ala. 555. In that case Edmunds contended that the justice of the peace who resided in beat 10 of Russell county did not have jurisdiction to issue the warrant which was executed in beat 1 of said county, said beat 1 not being a beat adjoining beat 10, and there being a qualified justice of the peace in beat 1. The Supreme Court of Alabama held adversely to this contention, holding that a justice of the peace in one precinct in a county has jurisdiction to issue a search warrant to be executed in any other precinct in such county, as follows:

> "This contention is based on the theory that this proceeding is a civil suit, and is governed by Section 4648 of the Code, as amended by the act of August 5, 1915 (Acts 1915, page 266), which declares that: 'Unless otherwise provided, no person can be sued out of the precinct of his residence, or that in which the debt was created, or the cause of action arose.'
>
> "For the purpose of venue and jurisdiction, this proceeding is unquestionably to be regarded as criminal.—Com. v. Intox. Liq., 13 Allen (Mass.) 561. And in criminal matters a justice's process reaches everywhere within the county. *Ex parte* Davis, 95 Ala. 9. 13; 11 South. 308; Code, Sec. 6733. But, if it were not a criminal proceeding, it was long ago settled that the venue statute referred to is confined to suits commenced by summons, and has no reference to a proceeding in rem. Atkinson v. Wiggins, 69 Ala. 190. The

search and seizure act itself provides (Acts 1915, page 18) that 'the warrant may be issued by justices of the peace,' without restriction as to venue. *The warrant in question was properly issued by the justice of beat 10.*"

These statutes to which I have referred and the companion statutory provisions provide for the execution of search warrants by a sheriff or constable and in certain instances by police officers.

A more recent Act (Acts Special Session 1920, page 8, Section 2), provides that members of your force may "execute search warrants in all cases and under such conditions as such search warrants are executed by the sheriffs and other officials under the laws of the State."

I am of the opinion that the magistrates in the various counties in Alabama have legal authority to issue search warrants to search premises for prohibited liquors in any precinct within the borders of the county.

Trusting that the foregoing supplies all the information desired by you, and if not, that you will call for such further advice as may be desired, I am

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

CONVICTS:—Time absent on escape not counted as time served on sentence.

July 21, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

Dear Sir:

You ask for an opinion from this office on the question of whether a convict should serve beyond the date of expiration of his term for a number of days corresponding to the time he was absent as an escape.

On April 24, 1915, Hon. Wm. L. Martin, then Attorney General, held that when a prisoner on parole violates the conditions of his parole, his parole shall be subject to revocation, and he must serve the full term fixed in the sentence

of the court as if no parole had been given him. That is, he must serve the portion of the sentence unexpired at the date of the parole. (Fuller v. State, 122 Ala. 32.)

This is even more true of an escape, for, as stated in Scott v. Chichester, (Va. 1908) 16 L. R. A. (N. S.) 304, a man shall not be permitted to take advantage of his own wrong.

In *ex parte* Moody, 83 South 529, it was stated that the time a convict was at large following an escape could not be included in calculating the period of imprisonment. In Shamblin v. Penn. 97 S. E. 520, an escaped prisoner was returned to the chain gang, and required to serve the entire term that remained unexpired at the time of his escape. Other cases might be cited to the same effect.

I therefore advise you that the time the prisoner was absent as an escaped convict is not counted as time served on his sentence, and his term should be prolonged for a period equal to the number of days he was absent.

Yours very truly,
B. S. OSGOODE,
Assistant Attorney General.

STATE PRISON INSPECTOR:—Traveling expenses in attending Congress of American Prison Association may be paid through Board of Control and Economy.

July 27, 1921.

Dr. Glenn Andrews,
State Prison Inspector,
Capitol.

Dear Sir:

Answering your inquiry as to whether your necessary expenses to attend the Congress of the American Prison Association for the purpose of reading a paper on merits and demerits of county chain gang system can be made a proper charge against the State, I beg to advise as follows:

The appropriation made for traveling expenses of the State Prison Inspector was for such traveling expenses necessary to the discharge of the duties required by law (Acts 1919, p. 989 (66). The Act approved April 22, 1911, extending the duties of the State Prison Inspector, con-

templates traveling for the purpose of making inspections of certain State institutions. (Acts 1919, p. 631.) The phrase, "and to visit any and all places designated by the Governor," cannot be construed, when taken in connection with other terms of the law prescribing the State Prison Inspector's duties, to empower the Governor to authorize any travel, for any purpose. The rule of statutory construction compels the limiting of such comprehensive terms to the specific immediately preceding objects.

Martin v. State. 156 Ala. 89; 47 South 104.
Cloverdale Homes v. Cloverdale, 182 Ala. 419; 62 South 712.

The State Prison Inspector was by Act approved September 30, 1919, placed under the direction and control of the State Board of Control and Economy. (Acts 1919, p. 1119, Sec. 2.) Section 7 of the Act creating the Board of Control and Economy provides for paying the traveling expenses of its members, agents or employes *"for necessary travel on official business."* (Acts 1919, p. 44, Sec. 7.) Attending a convention for the sole purpose of reading a paper is not such business as could be classed "official business" within the meaning of the term. However, the duty of the State Prison Inspector is to improve jail and prison conditions. It is well recognized that in conferences of officials employed in the same character of work there can be secured much information that will materially aid in solving the problems of the Department and result in great benefit to the State. Under the broad powers given the Board of Control and Economy, I am of the opinion that attendance on convention for such purposes may be authorized by the State Board of Control and Economy, as provided by law, if such trip is deemed to the best interest of the State.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

COUNTY SOLICITOR:—Change in salary on account increased population of county takes effect from date of publication of new census figures.

August 3, 1921.

Hon. F. E. Poole,
Grove Hill, Ala.

Dear Sir:

Replying to your letter relative to the salary of the county solicitor, which is based on the amount of the population of the county, I beg to advise as follows:

The Act of 1915, approved September 15, 1915 (Acts 1915, p. 820), provides that "the population to be determined by the last federal census preceding the time of payment of salaries." It is very clear from this provision of Section 5 of the Act that the salary of the county solicitor at this time must be determined by the 1920 census.

There is no provision made in the Act of Congress approved March 3, 1919, under which the last or 14th decennial census was made, for a date on which that census should become effective. The only cases this office has been able to find passing upon statutes similar to the one under consideration hold that in the absence of statute requiring any formal action by the census board or the legislature, a census goes into legal effect as such upon its complation and publication by the census superintendent or board of census.

Wolf v. Morehead, 98 Minn. 113.
Greene v. Narragansett, 29 R. I. 380.

It will be necessary for you to secure a certificate from the census director showing when the population of Clarke County was compiled and published. The librarian has been unable to furnish me this information. The change in salaries would take place on this date.

Section 281 of the Constitution has no application to officers who take office after the approval of the Act which fixes their salaries. In other words Section 281 would prevent the legislature from changing the salary of the officer during the term of office.

When your county solicitor was appointed, however, he took that office with the knowledge that if the census increased or diminished, his salary would likewise be in-

creased or diminished. Section 281 does not prevent the law which was passed and approved prior to the beginning of his term of office from having full force and effect according to its terms.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

TAXATION:—Where assessment was delayed on account litigation over production of books, interest is not added. Interest not added to escaped taxes.

August 5, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My dear Sir:

This will acknowledge receipt of your letter of July 16, 1921, with reference to the interest on assessments of *ad valorem* set aside by the State Tax Commission.

As I understand it, this case arises out of the decision of the Supreme Court of Alabama in the case of State Tax Commission v. T. C. I. R. R. Company, now in manuscript. In that case the State Tax Commission established before the Supreme Court its right under Sections 138 and 148 of the Revenue Act of 1919, to require tax payers in litigated cases, at reasonable times and places to produce books of account, balance sheets, ledgers, etc., for the inspection of the commission or its agents. Before the rendition of this decision various taxpayers, while making a proper return of their property, refused to furnish the information required by the tax commission, and the tax commission, feeling that it needed such information, set aside the returns, made arrangements to contest its right to require such information and, in the meantime, made no assessment of the property. Since the rendition of the above mentioned decision, such information is available and the question now is, whether or not the taxpayers who illegally refused to permit examinations of their books by the State Tax Commission should be charged interest upon the tax as being delinquent. The real question in this case is whether or

not taxpayers who refused to permit an examination of their books are subject to the penalty of the addition of interest as provided by Section 202 of the Revenue Act of 1919.

I am of the opinion that while by Section 54 of the Revenue Act of 1919 the failure to furnish such information or permit such inspection is a misdemeanor, and while under Section 148 of the same Act such information may be compelled by mandamus or by contempt proceedings, still such failure cannot be "punished" by the addition of interest.

Although there may be some question as to whether or not interest is a penalty, it is undoubtedly the rule that delinquent taxes do not bear interest, unless it is expressly so provided by statute, and such statutes must be strictly construed.

Perry County v. Selma Railroad Company, 65 Ala. 391.

Section 202 of the Revenue Act provides:

> "All taxes becoming delinquent bear interest at the rate of 8 per cent per annum; and such interest must be added to and collected as a part of the taxes and reported in such manner as the state auditor may prescribe."

You will note that this section, which is the only section of the Revenue Act with reference to interest on taxes, applies only to delinquent taxes. In order to become delinquent a tax must have been assessed.

Selma R. R. v. Perry Co., 58 Ala., 546, 559, 567.

In the present case there has been no assessment and hence no delinquency. This conclusion is supported by the decision of Stein v. Local Board, 135 Iowa, 539, 113 N. W. 339, in which it is said in part:

> "In view of what has been said foregoing, it is unnecessary that we speak of the act of the board in adding the 100 per cent to the assessment as a penalty; but it may not be amiss to add that the operation of the penalty statute was misunderstood. It is only where there is a refusal to furnish to the assessor a

verified statement or to list property subject to taxation that a penalty is authorized to be imposed, Code Section 1357. And this statute like all others imposing penalties must be strictly construed. The penalty for a false statement by a taxpayer respecting the amount of his indebtedness if any there be, would be that imposed by Code Section 1358, which makes a false statement to the assessor, verified as required by law, perjury."

37 Cyc. 1544.
See also the First Headnote in Chicago Railroad Company v. People, 217 Ill., 164.
75 N. E. 368.

In view of these decisions it is my opinion, that the State Tax Commission may cause prosecutions to be brought against these taxpayers for the misdemeanor declared by Section 54, and it may institute mandamus or contempt proceedings under Sections 138 and 148, but it cannot add interest to the tax as now for the first time assessed.

In your same letter you submit a question with reference to escaped taxes which is closely analogous. You state that certain property escaped taxation for the year 1917, and was assessed in 1921 as an escaped tax. All tax for 1917 under a provision of the Acts of 1915, identical with Section 202 of the Acts of 1919, hereinabove quoted (Section 154, Acts 1915, p. 449), bore interest on delinquency. You inquire whether or not in addition to the penalty of ten per cent provided by Sections 58, 87, and 224, of the Revenue Act 1919, interest from January 1, 1918, should also be added.

It is my opinion that interest should not be added. Sections 58, 87, 225 are complete within themselves. They deal exclusively with the question of escaped taxes and they provide the penalty. I do not think that Section 202 was meant to cover the same situation. While in a sense an escaped tax is a delinquent tax, the two things are separate and were separately treated by the Legislature.

I am supported in this conclusion by the language of N. Y. Court of Appeals in the case of People v. The Gold Tel. Co., 98 N. Y. 67 at 79.

"The State at its pleasure created the charge or tax, and prescribed the penalty for default in payment. No other can be collected. In this case the comptroller is directed to add 'ten per centum to the tax of said corporation or company * * * for each and every year for which such tax shall not have paid,' (Sec. 2), and by Section 9 an action is given to the people for the tax imposed. Interest is not given either by this Act or by any general law of the State. The payment of it cannot be imposed by implication. What the State omitted to demand, the court cannot require. But the legislature has not overlooked in this respect any property right of the State. Where interest is given it is as damages or compensation for delay in payment. The creditor is supposed to have lost something and to require indemnity. Here the legislature has ordained it. Ten per cent annually is to be added. Whether it lay in the mind of the legislature that this was interest or not, we do not know. It is what is given; and that it is given and nothing more, excludes any plausible contention that the taxpayer is liable beyond it. So far, therefore, as the judgment allows interest, it should be modified."

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

TAXATION:—Collection of taxes due by life tenant assessed and unpaid but not delinquent at date of his death.

August 5, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My dear Sir:

I am in receipt of your letter of July 21, requesting further information as to the subject dealt with in the opinion rendered by me on July 15, 1921, namely: "Where A is the owner of the life estate in real property on October 1, and the property being assessed to him, he dies previous to the time when the tax becomes delinquent, what remedy has the

State to recover the tax?" That there is no right to sell the property at the time the delinquency had come into the hands of the remainder man seems to be clear. I have nothing to add in this respect to the previous opinion rendered you.

You suggest that the property might be assessed to the remainderman as an escape. However, this would be an effort to do indirectly what certainly cannot be done directly, against the prohibition of Section 266. The property was once properly returned and assessed, and hence it cannot with any proper use of the term be called an escape.

Under these circumstances, I can only suggest to you that in the event the life tenant left any property at all the State has a first lien upon it under Section 405 and in the event there has been any delinquency upon the part of the tax assessor or collector, they may be proceeded against under Sections 214 and 219 of the Revenue Act.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

HIGHWAY DEPARTMENT—Not authorized to pay for medical services rendered employees.

August 10, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

This will acknowledge receipt of your letter of June 27th, with reference to claims for medical services rendered to persons employed by the State in building Pea River Bridge at Ariton, which has been referred to me for reply.

The Highway Act of 1919 (Acts 1919, page 890), permits the State Highway Engineer to employ such "assistant engineers, chemists, clerks, stenographers, draftsmen, foremen and laborers" as may be necessary for the purpose of carrying on the work of the State Highway Department. This enumeration does not include physicians, and I am aware of no general power given the Highway Department which is broad enough to authorize disbursements for medical services to employees. In the absence of such statutory

authorization, such claims should not be paid by the State Highway Department.

The case presented is very similar to that dealt with in Mitchell v. Tallapoosa County, 30 Ala. 130. The question there presented was the liability *vel non* of a county for physicians' services rendered a prisoner under the authorization of the sheriff, and it was held that there was no such liability in the absence of a statute. It was only after legislative action that the county became liable for such claims.

Malone v. Escambia County, 116 Ala. 214.

The State Highway Department is, like the counties, a branch of the State, and its liability for such claims must be found in the statute. There is no indication that free medical atttnetion was included in the contract between the Highway Department and the injured employees, who were paid a certain wage per hour for their work, but looking at the contract from this point of view, it still seems to be unauthorized by the Act.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

TAX ASSESSORS:—Compensation for revising plat books not provided by law.

August 10, 1921.

Mr. J. A. McClurkin,
Tax Assessor,
Camden, Ala.

Dear Sir:

This office is in receipt of your letter of June 25, 1921, in which you inquire what compensation a tax assessor is entitled to for services required to be rendered by Section 69 of the Revenue Act of 1919, Acts 1919, page 307.

Sections 67, 68, 69 and 70 of the Revenue Act of 1919, prescribe the duties of tax assessors with reference to the making and revising of plat books. Section 67 provides for the making of a complete map and list of all blocks and lots which have been platted. Section 68 provides for a complete plat book of all real estate in the county. Section 69 provides for the revising of the two kinds of plat

books mentioned in Sections 67 and 68. Section 70 assesses a penalty for the failure to comply with the provisions of Sections 67, 68 and 69.

Norton v. Kumpe, 121 Ala. 446.

It is a familiar rule of statutory construction that provisions *in pari materia* shall be construed together. Under this principle I am of the opinion that the "entries" which are required in Section 67 include the revision of the plat book provided for in Section 69. It being expressly provided that such entries are to be made by the tax assessor without compensation, I am of the opinion that the tax assessor must do this work as a part of his regular duties in and about the assessment of taxes, and is entitled to no extra compensation therefor.

Mobile County v. Williams, 180 Ala. 647.

The fact that Section 68 expressly provides that the county shall pay for the "*making out* of the plat book required by this and the preceding section" seems to be a very clear indication of an intention on the part of the legislature that no compensation should be paid for the annual changes, the plat books having once been made out. Further, statutes appropriating money are strictly construed and there is no provision in this Act specifically stating how much compensation shall be paid to the tax assessor for such work, who shall pay it, or when it shall be paid.

Very truly yours,
MARION RUSHTON,
Special Assistant Attorney General.

TAXATION:—Where assets of bankrupt insufficient to pay preferred claims, he may be sued by State after his discharge, and judgment collected out of any property then owned by him.

August 10, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

Your letter of July 14th states the following facts:

A goes into bankruptcy and in due course is discharged. His assets are not sufficient to pay any part of the preferred claims against his estate. Subsequent to his discharge in bankruptcy, he buys a new stock of merchandise and resumes business in his own name.

You ask whether a lien exists on this after acquired property for the taxes due by the bankrupt prior to bankruptcy proceedings.

As we have previously advised you, a discharge in bankruptcy does not release the lien on any particular property for taxes due on this property. A lien, however, is a right in rem, and may be enforced against the property into whosoever hands it goes. The lien attaches to specific property, because of conditions existing at the time the lien is created. And it is this particular property which may be subjected to the lien, and not other substituted property. Under the facts given, therefore, the bankrupt's after-acquired property is not subject to a lien for taxes previously due.

The State, we think, has an adequate remedy for the collection of this past due tax.

The Bankruptcy Act (U. S. Comp. Stat. 1918, Sec. 9601) provides:

> "A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as (first) are due as a tax levied by the United States, the State, county, district, or municipality, in which he resides."

An action at law will lie for the collection of taxes, although a statutory remedy is also given to enforce their payment, unless the statutory remedy is exclusive.

> Perry County v. R. R., 58 Ala. 546.
> Bain Bros. Inv. Co. v. Purdie, 180 Ala. 333.
> Greil Bros. v. Montgomery, 182 Ala. 291.

Section 207 of the Revenue Law of 1919, which has been brought down through several Codes, provides:

> "No property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes, etc."

Solomon v. Willis, 89 Ala. 596, 7 So. 160, construes the identical provision in a prior revenue law. Mr. Justice Somerville, in the opinion of the court, says:

> "It is sufficient for the purposes of this case to say that, under the express provisions of our statutes governing the subject of taxation, 'no property, whether exempt by law from taxation or not, shall be exempt from levy and sale for the payment of taxes, etc.' This obviously embraces any personal property whatever, whether listed for taxation by the owner, or not listed. The law is framed ex industria, so as to allow nothing to escape from subjection to the payment of the public revenue, without which there can be no regular organized government."

See also:

Doe v. Minge, 56 Ala. 121.

This would be the law in Alabama, even in the absence of the above quoted statute.

Scales v. Alvis, 12 Ala. 620, 46 Am. Dec. 269.

To recapitulate:

First: No lien exists on after acquired property for previously due taxes.

Second: The discharge in bankruptcy does not release the debt for taxes.

Third: Suit at law may be maintained for the collection of the past due taxes.

Fourth: The judgment obtained against the taxpayer may be collected out of any property owned by him, without the allowance of any exemptions.

Yours truly,

HENRY P. WHITE,
Special Assistant Attorney General.

TALKING MACHINE DEALER'S LICENSE:—Covered by schedule 4 rather than schedule 85 of Revenue Act of 1919.

August 12, 1921.

Hon. H. F. Lee,
State Auditor,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 11th instant, concerning license tax paid by the Tennessee Coal, Iron & Railroad Company on talking machines for four of its stores in Jefferson County.

Acts 1915, page 491, covered the license on talking machines, and Acts 1919, page 396, schedule 4, contains practically the same language as Schedule 4 of the 1915 Act referred to, except as to the amount of the license tax. Schedule 4 of the 1919 Act includes the talking machines in the caption of the schedule.

It appears from the correspondence attached to your letter, which is returned herewith, that the Tennessee Coal, Iron & Railroad Company has paid for four licenses under Schedule 4 of the 1919 Act, and has since discovered that talking machines are also included in Schedule 85 which it is claimed by the Tennessee Coal, Iron & Railroad Company authorizes said company to do business at all four of said points by the payment of one license, and the company requests that refund be made to it on the basis of Schedule 85.

Schedule 85 of the 1919 Act, Acts 1919, page 426, is a revision of Schedule 87 of the 1915 Act, Acts 1915, page 519. It will be observed from Schedule 87 of the 1915 Act that no mention is made of talking machines, and talking machines are not included in the caption of Schedule 85 of the 1919 Act, but as stated above, in the caption of Schedule 4, of the 1919 Act.

It seems apparent to me that the inclusion of talking machines in Schedule 85 of the 1919 Act was effected through inadvertence on the part of the legislature, it evidently being the intention of the Legislature to let Schedule 4 of the 1919 Act cover the privilege of selling talking machines for the reasons above stated.

In 36 Cyc., page 1106, paragraph 2, it is stated that the great fundamental rule in construing statutes is to ascer-

tain and give full effect to the intention of the Legislature. In 36 Cyc., page 1137-b, the writer states that for the purpose of removing ambiguities in the language of a statute, it must be read with reference to all the facts and circumstances connected with its enactment, such as the state of the existing law, etc.

Considering the facts in this case, in connection with the two principles of law above stated, it seems apparent to me that the inclusion of talking machines in Schedule 85, which has to do with piano and organ dealers, as stated in the caption, was an oversight on the part of the legislature, and it was the intention that Schedule 4 of the 1919 Act should cover talking machines, as they had been covered by Schdule 4 of the 1915 Act, and no mention is made in Schedule 87 of the 1915 Act which is superseded by Schedule 85 of the 1919 Act.

Acts 1919, page 445, Section 375, being a part of the General Revenue Bill, provides that when any person through a mistake or error on the part of the judge of probate, has paid to the judge of probate money that was not due from him for such license, or by mistake has paid to the judge of probate for such license an amount in excess of that required by law for the business to be carried on by such person under the license, such person shall be entitled to have refunded to him the amount so erroneously collected by the judge of probate.

I see no reasonable grounds for the contention that an error has been made in assessing this license tax for the reasons above stated, and am therefore of the opinion that the judge of probate should decline the petition filed for the refund.

Very truly yours,

LAMAR FIELD,
Assistant Attorney General.

PROHIBITION LAWS:—Immunity to witness required to testify cannot be claimed by volunteer seeking thereby to escape prosecution.

August 17, 1921.

Hon. J. E. Acker,
County Solicitor,
Ozark, Ala.

Dear Sir:

The Attorney General has referred your letter of June 25, 1921, to me for answer.

You call attention to provision of Section 12 of the prohibited liquors law of 1915 (Acts 1915, p. 12), that it shall not be necessary to first "specially interrogate the witness as to any particuar offense," and ask what is to prevent an offender against the prohibition laws from having himself summoned before the grand jury, then volunteering information concerning his own offense and thus securing the immunity offered by this provision of the statute. I am of the opinion that the immunity granted by Section 12 (Acts 1915, page 12) cannot be secured by a volunteer. Such an immunity springs from a provision of the Constitution against enforced self-incrimination. Sometimes the State in its desire to apprehend one offender against the laws, is willing to permit another offender to go free. In pursuance of this policy it may require one of the offenders to testify, but when it does the constitutional provision above referred to makes it necessary that an immunity be offered. You are familiar with the rule that forced confessions are not admitted in evidence. Voluntary confessions are, however, admissible; on the same principle the self-incriminating testimony of a witness must be forced in order to secure immunity.

16 C. J. 95.
40 Cyc., 2543.
Long's Case, 86 Ala., 36 at 44.
Martin's Case, 136 Ala., 32 at 35.
Wall's Case, 105 Miss. 543; 62 South 417.

In Sandwich v. State, 137 Ala. 85, a similar statute granting immunity in gambling cases was construed by our Supreme Court. Although the immunity was in that case held to exist, the Supreme Court was careful to say:

"The fact remained, that the defendant was indicted, after *he had been required as a witness* to answer generally as to any violation of the laws against gaming within his knowledge, and had so answered, thereby entitling himself to protection from prosecution as to any such offense so testified to by him."

The very language of the Act seems to indicate that only one who is "required to answer" is entitled to the immunity. The solicitor certainly has the option to require or not to require the witness's testimony. In my opinion the solicitor may limit the answer of the witness to offenses committed by others than himself and thereby clearly prevent the witness from securing immunity for himself. The statute is enabling merely, and not mandatory.

Very truly yours,
MARION RUSHTON,
Special Assistant Attorney General.

DEPUTY SOLICITOR:—When required to perform duties of circuit solicitor, cannot receive per diem as special solicitor.

Hon. H. F. Lee, August 18, 1921.
State Auditor,
Capitol.

Dear Sir:

I return herewith letter from Hon. Calvin Poole, attorney of Greenville, Alabama, to you dated August 16, 1921, together with papers which reached this office attached to said letter.

This correspondence raises the point whether a deputy solicitor, appointed under Acts 1915, page 817, can legally be appointed special solicitor under Section 7787 of the Code and collect for his service $10.00 per day.

Section 4 of the Act above referred to makes it the duty of the deputy solicitor to "perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor," and the Act provides what salary shall be paid to such deputy solicitors for the services required by the provisions of the Act. Section 10 of the 1915 Act provides that "all local, general or special laws in conflict with any of the provisions of this Act are hereby expressly repealed."

Inasmuch as the Code provides that a special solicitor shall be appointed by the judge to act in the place of the regular solicitor when he is absent, such special solicitor to be paid at the rate of $10.00 per day for his services, and the 1915 Act expressly requires the deputy solicitor, who is paid a fixed salary for his services, to "perform all the duties of the circuit solicitor in his absence when so directed by the circuit solicitor," it is clear that there is a conflict between the two statutes, and that the Code provision is superseded by the 1915 Act.

The 1915 Act requires the deputy solicitor, in return for the annual salary which is paid to him under the provisions of the Act, to fill the place of the circuit solicitor when he is absent, and request is made therefor by the circuit solicitor, and this without any compensation or per diem other than that provided for in the Act.

The case of Douglass v. Prowell, Judge, etc., 130 Ala. 580, cited in Mr. Poole's letter does not, in my opinion, touch the question here involved. In that case the court was dealing with a local law which provided that when the solicitor was absent the judge of the court should appoint a solicitor *pro tempore* to take his place. It was held that this express mandate of the statute excluded from the deputy solicitor the right to appear in that court in the absence of the solicitor. That decision was undoubtedly correct under the statutes there involved, but here we have the reverse of the statutory provisions there involved, since the 1915 Act provides that the deputy solicitor shall act, which excludes all others.

It is my understanding that Mr. Poole is the deputy solicitor, and was requested by the circuit solicitor to act in his, the circuit solicitor's absence.

I am of the opinion that the case comes squarely within the requirements of the 1915 Act, and that the deputy solicitor in rendering this service was doing no more than his duty and what is required of him by the 1915 Act.

The fact that the judge made an order for him to do what he was already required under the law to do, does not, in my opinion, affect the matter in any way.

Yours truly,
LAMAR FIELD,
Assistant Attorney General.

PUBLIC SERVICE COMMISSION:—Has jurisdiction over municipally owned utility operated by private lessee.

August 19, 1921.

Alabama Public Service Commission,
Capitol.

Dear Sirs:

In re: Alabama Water Company Attalla operations. Your Docket No. 4072.

Your entire file in this case, including petition of the Alabama Water Company for raising rates, the testimony taken upon the hearing of the case before you on June 2, 1921, together with the brief of the Alabama Water Company by Mr. John B. Weakley, and the brief of City of Attalla by Messrs. E. O. McCord & Son, has been submitted to the Attorney General for his opinion upon the question of the jurisdiction of the commission to fix rates in such case. The question of jurisdiction alone is submitted to the Attorney General for his opinion. Upon this question, I beg to advise you as follows:

It appears from the evidence without dispute that title to a large part of the property constituting this water plant is in the City of Attalla; that in the year 1916, a contract was entered into between the Alabama Power Company and City of Attalla whereby this part of the present water plant was leased to the Alabama Power Company for a period of twenty-seven (27) years. Under the provisions of this lease contract certain rates were fixed for water to be furnished to the municipality itself and to its citizens during the period of the lease. This lease contract provided that it could be transferred or assigned by the Alabama Power Company and a year or so later such lease was transferred to the Alabama Water Company. The lease provided that the original lessee should make certain additions, extensions and improvements to the original plant belonging to the City of Attalla. It appears without dispute that the Alabama Power Company and its assignee of the lease have made considerable additions, extensions and improvements to such water plant and distribution system. No question is raised by the City of Attalla as to the validity or the sufficiency of the transfer and assignment of such lease by the Alabama Power Company to the Alabama

Water Company to operate the water plant under such lease and the assignment thereof.

It is admitted that the Alabama Water Company entered upon the performance of its duties and obligations as to the operation of such water plant and has continued in such operation, and is now lawfully operating the water plant under this lease.

It would extend this opinion to unnecessary length if I should undertake to discuss each separate contention made by the City of Attalla to the effect that the commission is without jurisdiction to fix rates of this public utility. Many of these contentions may be matters which should be taken into consideration by the commission in the determination of rates to be fixed by it in the case. After careful consideration of all such contentions and the authorities cited by counsel for City of Attalla, I am of the opinion that all such contentions are insufficient to show that there are any conditions here existing which prevent the commission from having jurisdiction to fix rates in this case.

The jurisdiction of the commission applies in the case of every person, firm or corporation not engaged solely in interstate business, that owns, operates, leases, or controls any plant, property or facility for the supply, storage, distribution or furnishing to or for the public, of water for manufacturing, municipal or domestic uses. General and Local Acts of Alabama, Special Session, 1920, pp. 38, 39.

Here also is found a definition of the word "rate" which clearly applies to the matter which is the basis of the petition to the commission in this case. It is clear, I think, that the legislature intended by the Act approved October 1, 1920, known as the Alabama Public Utility Act of 1920, to give general and exclusive power and jurisdiction in the case of the utilities mentioned, in respect to the rates, service, regulations, etc., of such utilities without any exceptions beyond those expressly named in the Act. A reasonable construction of the entire Act indicates beyond any doubt, I think, that the exception named in the Act as to any utility owned and operated by any municipal corporation in the State does not apply in the case of a utility which is owned by a municipality but is not operated by it, the same being operated and controlled by another. It is without dispute in the present case that the City of At-

talla has nothing to do with the operation of the water plant in question. The very fact that the Act itself expressly gives jurisdiction over any person operating a utility as lessee and does not except a utility in the case of a municipal corporation unless it is both owned and operated by the municipality, seems to me to put this issue beyond question. Section 2, 17, 66, General Acts 1920, pages 38, 45, 57.

The fact that the so-called contract right of the City of Attalla under the lease given by it to the Alabama Power Company, later transferred to the Alabama Water Company, may be affected in case the commission should find it necessary to raise the rates for water above those fixed in such lease agreement, is not enough to prevent the jurisdiction of the commission from attaching in this case The powers exercised by this commission in fixing rates and in otherwise regulating public utilities, arise out of the police power of the State. Such police power is inherent in and incident to the sovereignty of every state. It is exercised for the public welfare and convenience in those functions that make for the health, safety, morals, good order, comfort, or general welfare of the public. Such powers may not be bargained away or controlled by contract.

> Northern Pac. R. R. Co. v. Minnesota ex rel. Duluth, 208 U. S. 583 (52 U. S. L. Ed. 630).

The mere fact that property rights under contracts may be affected by the exercise of such police power does not prohibit or prevent the exercise thereof.

> Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989.
>
> Railroad Commission v. Ala. Northern Ry. Co., 182 Ala. 357, 368.

In the case of Railroad Commission v. Ala. Northern Railway Company, supra, our Supreme Court, speaking through Mr. Justice Anderson, said that such police power of the State could be exercised by the Railroad Commission and was not violative of the State or Federal Constitution, although as a result of the exercise of such power in that case the Railroad might lose the use of the old building and the use of the lot as a location for its passenger depot. In

this case the Railroad Commission has made an order requiring defendant and other railroads to build, occupy and use a union passenger depot. Mr. Justice Anderson, speaking further of the defendant's situation in regard to the loss of the use of its old building and lot as a location for its passenger depot, said: "It acquired the lot and erected the building with a full knowledge of and subject to the police power of the State."

A proper construction of the law with respect to the case now before the Commission compels the Commission to hold that the City of Attalla and the Alabama Power Company both entered into the original lease in this case with a full knowledge of and subject to the police power of the State.

A very high authority has said with respect to what the police power includes, as follows: "It may be said in a general way that the police power extends to all great public needs."

Noble State Bank v. Haskell, 209 U. S. 111; 55 Law Ed. 112, 32 L. R. A. (N. S.) (1062).
Southern Express Co. v. Whittle, 194 Ala. 418.
Advertiser et al. v. State, 193 Ala. 418.
McDavid v. Bank of Bay Minette, 193 Ala. 341.

On the basis of the above authorities, it is my opinion that the Commission has jurisdiction in this case.

Very truly yours,
HUGH WHITE,
Assistant Attorney General.

TAXATION:—Property sold for taxes and bought in by the State valued yearly and tax added accordingly, to be paid on redemption. Assessment made after that for which delinquency occurred is basis for redemption for that year.

August 24, 1921.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

You state the following facts:

On October 1, 1919, real estate was assessed to A for $5,000. On October 1, 1920 (when taxes on the first assess-

ment became due), the same real estate was again assessed to A for $10,000. Both assessments were legally and properly made. In May, 1921, this property was sold for nonpayment of the taxes due October 1, 1920. After this sale and before October 1, 1921 (when the taxes on the second assessment became due), A comes in and redeems the property. The probate judge collected taxes on the property for the current tax year, but calculated the amount on the $5,000 valuation, instead of the current year valuation—$10,000.

Your inquiry is, should the taxes collected for the current year be based on the previous year's valuation, or on the existing valuation for the current year?

It is suggested that the provisions of Sections 257 and 269 of the Revenue Law of 1919 prevent the use of the new valuation as a basis for collecting the current year's taxes. Section 257, which has been in our Revenue Laws for years, provides in part:

> "Lands bid for the State shall not be thereafter assessed, except as hereinafter provided, until the same have been redeemd or sold by the State."

Section 269 provides how lands bid in by the State shall be thereafter assessed. The State Auditor is required to prepare a descriptive list of the lands so sold and to transmit same to the tax assessor of each county by the first day of August of each year. The tax assessor, after checking and comparing the list with the county tax sales record, puts a fair valuation on the lands contained in such list. This valuation is entered upon the list and the taxes calculated upon this valuation and the list is then returned to the State Auditor. The Auditor shall thereupon, and annually thereafter until such land is redeemed or recovered, or sold by the State, add the amount of the taxes so assessed on such valuation to the amount for which the lands were sold and such proceedings shall have the effect of a due assessment of taxes against said lands.

> "The assessor shall furnish to the judge of probate a copy of the list returned to the State Auditor, and it shall be the duty of the judge of probate to enter the

taxes therein calculated on the record of sale thereof kept in his office."

The above two sections of our Revenue Law should be considered in connection with Sections 290 and 291, which expressly stipulate the amounts required to be paid in redeeming lands bought by the State. The redemptioner, in addition to other amounts specified, must pay the taxes due on such lands since the sale, *"including the current tax assessing year."* Where lands have been sold to another than the State, the redemptioner is required to pay all taxes *due* and to "deposit the amount of the *taxes assessed for the current year* with the tax collector."

We can find nothing in any of the above cited sections of the law which authorizes the probate judge to calculate the current year's taxes on a previous year's valuation. Even assuming, for argument's sake, that the current year's valuation is absolutely void, why should the probate judge arbitrarily select the preceding year's valuation rather than *some other year's valuation?* Or, in the absence of a valid valuation for the current year, why doesn't he arbitrarily fix the value himself? The statutory remedy of redemption is complete and exclusive and it does not authorize the probate judge to substitute other amounts for those named in the statute.

The four sections of our Revenue Law above cited are parts of a consistent revenue system. Land is assessed *annually* in Alabama for taxation on the first day of October. The taxes so assessed are due on the first day of October of the year following. On the date the tax becomes due, the land is again assessable for taxes. The tax on the first assessment is not delinquent, nor can the land be sold for taxes, until long after the land *has been assessed* the second time. The validity of this second assessment depends on the status as of October 1. The subsequent delinquency of taxpayer certainly cannot render invalid an assessment which was valid when made. The provision in Section 257 that 'lands bid for the State shall not be *thereafter assessed* except as hereinafter provided," refers to the assessment period fixed by law. The law makes known that the land had already been assessed for the current year. "Thereafter," of necessity, means October 1, following, when the land again becomes assessable.

The general principles of law relied on in support of this opinion are well stated by Judge Somerville in Bain Bros. Inv. Co. v. Purdie, 180 Ala. 336, 60 So. 920.

> "In Osborne v. Waddell, 57 So. 698, we held that the method of redemption from State and county tax sales, as prescribed by Sections 2313 and 2314, of the Code, is adequate and exclusive, and that chancery will not entertain a bill for redemption merely."
>
> "In this State taxes assessed against property have always been regarded not only a lien *in rem*, but also a personal debt due from the owner, and collectible by a personal action.—Perry County v. S. & M. R., 58 Ala. 546. Taxes are assessible on October 1, of each year, and whoever owns property on that date is the taxable owner and personally liable for the year's taxes."

There is nothing in Section 269 of the Revenue Law in conflict with the construction above suggested. The valuation put on the lands sold by the tax assessor is not intended as a substitute for an already existing valuation, but as a basis for calculating taxes for subsequent tax years. The fact that the land was bid in by the State, instead of an individual does not affect the validity of the *existing assessment*. If the land is redeemed *before* the first of October immediately following then this existing assessment fixes the amount to be paid for the current tax year. If the land is not redeemed until *after* the first of October succeeding the sale, the amount to be paid for the *then* current tax year is based on the valuation entered by the tax assessor in accordance with the provisions of Section 269. The tax year begins and ends on October 1. There can be but one valid assessment of property in one tax year. When property is redeemed the year of the sale and before the commencement of another tax year, the only legal assessment is the one made as of October 1 preceding. When property bid in by the State is redeemed in some subsequent tax year, the then existing assessment is the one made under Section 269.

It follows, therefore, that the probate judge, in the instance named by you, was wholly without authority to calculate the current year's taxes on the previous year's valuation.

Yours very truly,

HENRY P. WHITE,

Assistant Attorney General.

TAX SALES:—Judge of probate may decline to decree sale of insufficiently described lands, even though owner interposes no defense.

August 25, 1921.

Hon. Jno. S. Mooring,
Chairman State Tax Commission,
Capitol.

Dear Sir:

Your letter of the 20th instant, in which you request opinion of the Attorney General upon the question hereinafter stated, has been received. Such question is as follows:

Is it the duty of the probate judge to refuse to decree the sale of property for taxes on the ground of insufficient description when the taxpayer interposes no defense?

In reply I beg to advise you as follows:

Your question is peculiarly worded. I will assume, however, that the question which you desire to raise is this:

Under Section 249 of the Revenue Act of 1919, General Acts of 1919, page 355, if the description of the land in any case where the State seeks to have the probate court decree a lien upon the land and sale thereof for the payment of taxes is insufficient to the extent that in law it does not constitute a sufficient designation of the property, is it the duty of the judge of the probate court, ignoring the fact that such description is so defective as to be void, to enter a decree of sale, where the taxpayer interposes no defense; or has the judge of the probate court the judicial discretion upon his finding that such description is void because of its insufficiency, to decline to enter a decree of sale and dismiss the case?

The proceeding provided for under said Section 249 before the probate court, is clearly a trial of a cause. The language contained in each of the previous sections of the Act beginning with Section 240, down to and including said Section 249, indicates beyond doubt that the duties imposed upon the probate court with respect to decreeing the sale of lands for delinquent taxes is a judicial proceeding, and is not a ministerial act. It is not merely a quasi judicial act, which is often imposed upon officers whose duties are in the main ministerial. Consideration must be given also to the fact that the authority and power to try the case here in

question, are imposed upon the probate court, and not upon the judge of probate.

The suggestion has been made since said Section 249 provides that if service of notice of the proceeding is perfected ten days before the commencement of the term to which the same is returnable, the cause shall stand for trial at such term; and if no defense is interposed * * * the probate court *shall make and enter* on such book or docket a decree of sale, that it is the duty of the probate court in such case without regard to whether the description of the land shown in the tax book is insufficient and void, to enter a decree of sale.

It is suggested also that the jurisdiction of the probate court in this proceeding is statutory and limited, and that the judge of the probate court is limited not only as to *what* is within his jurisdiction, but also as to *how* he may proceed in the exercise of a function which, in my opinion, is wholly judicial.

It has been further suggested that the probate court is limited as to *how* he may judicially act in these cases because to admit that he may decline to decree a sale of lands for taxes on the ground that the description is insufficient and void, will work an inconvenience and hardship and perhaps loss upon the State, because in case the probate court should decline to decree a sale of lands for taxes for the reason above stated, there is no convenient and ready machinery provided by the Legislature for then obtaining a sufficient description of the land, a definite, proper and correct assessment of same, so as to enable the State to collect its taxes.

I have given careful consideration to these views.

It is plain that the Legislature has conferred upon the probate court jurisdiction to try these cases. The power to try the matters which are incidental and necessary to reach a decree, necessarily includes the power to ascertain whether there is a thing to which the lien of the State for taxes has attached, and which can be sold to satisfy such taxes.

It has often been held by our Supreme Court that this is a proceeding *in rem* and that the probate court must acquire jurisdiction of the land in order to render a decree that will pass any title to such land. The Supreme Court has further held that the probate court in this proceeding

can not acquire jurisdiction of the land unless there is a sufficient description shown by the tax book, and the description on the tax book must be that which is shown on the assessment.

Driggers v. Cassady, 71 Ala. 529.
Clark v. Tunstall, 179 Ala. 562.

If, therefore, there must be a sufficient description before the probate court can acquire jurisdiction of the thing to be sold, it certainly is within the province of the court in this proceeding to examine the evidence to determine whether or not there is a sufficient description. The mere fact that Section 248 of the Revenue Act, General Acts 1919, page 355, provides that the tax book of the tax collector must be accepted by the probate court as *prima facie* evidence of the amount of taxes and fees due, and that the same have been properly assessed and charged and are unpaid, is not conclusive upon the probate court. It is to be noted that this section does not in terms say that the description of the lands as shown on the tax book must be accepted by the probate court as *prima facie* correct and sufficient, and if it said this, in our opinion, it would not affect the conclusion which we reach.

The probate court is a court which has been created by the Constitution. Under the Constitution it is invested with power to determine matters judicial. The Legislature may invest it with jurisdiction in other matters beside those in which jurisdiction is given it by the Constitution, if such jurisdiction has not been by the Constitution given exclusively to some other court.

While the Legislature may within the limits of the Constitution, invest the probate court with jurisdiction to try causes, it is beyond the power of the Legislature to control how that could shall exercise the judicial functon and to dictate what judgments it shall enter. This would be clearly an invasion of the judicial department of government by the legislative.

In the class of cases here under consideration, the probate court is one of limited jurisdiction, and no presumption is indulged from the mere exercise of jurisdiction of the existence of facts to support the jurisdiction. Such facts will not be inferred, but must affirmatively appear from

the record. Let us assume that the probate court has entered a decree for the sale of lands for taxes where the description of the land was insufficient and void. On the next day such decree was entered, or twelve months after the decree was entered, the taxpayer, upon filing a petition before the probate court setting up the invalidity of the decree of sale because of the insufficient description of the land, and asking the court to vacate such decree, would be entitled to have the decree vacated and set aside, and it would be the duty of the probate court upon such a petition's being filed, and upon its being supported by evidence to the above effect, to vacate and set aside such decree.

Driggers v. Cassady, 71 Ala. 529.
Chamblee et als. v. Cole, 128 Ala. 649, 651.
Milbra v. Sloss, S. S. & I. Co. 182 Ala. 630.

A probate court has such incidental and ancillary jurisdiction as is necessary to an efficient exercise of the jurisdiction conferred on it.

15 C. J. 1012;
May's Heirs v. May's Administrators, 28 Ala. 141.
Harrison v. Harrison, 9 Ala. 470.
Johnson's Administrator v. Longmire, 39 Ala. 143.

It is my opinion, therefore, that the judge of the probate court may refuse to decree the sale of property for taxes on the ground of insufficient description even when the taxpayer interposes no defense. If it is the duty of a judge when he finds that there is nothing before him to be affected by his decree, to dismiss the proceedings, then I will say that it is the duty of the judge of the probate court to dismiss any such case if he finds that the description of the property is so insufficient that it is void, and hence nothing would be sold, even if a decree of sale should be entered.

I do not think the State is without remedy in this situation. It has a right of appeal from a decree of the probate court dismissing the case. Section 2855, Code of 1907. Such appeal must be taken within six months from the rendition of the decree. McKenzie v. Jensen, 195 Ala. 36. 39.

Again as the probate court is given jurisdiction in this matter, if such court renders a decree dismissing the cause on the ground above stated, that is, that the description is insufficient and void, this is an adjudication of the matter by a court having jurisdiction and would be binding on the taxpayer, and the legal effect of such a decree of dismissal would be that there had been no assessment of the land which the taxpayer or the tax assessor had attempted to describe and assess.

The law makes it the duty of the tax collector to attend the trial of these cases before the probate court and hence the presumption is that the tax collector is present when the probate court enters a decree of dismissal in such cases. The tax collector is then put upon notice that there is land belonging to the taxpayer named in the case which has not been assessed. Thereupon it becomes the duty of the tax collector to obtain a correct and sufficient description of such land, and to proceed to assess the same for taxes, and to collect the taxes due, and it also becomes the tax collector's duty to report such land to the tax assessor who must enter such assessment in the back part of the book of assessments.

Sections 224, 225, General Acts 1919, p. 349.

But even if this authority had not been given to the tax collector, and if it had not been made his duty under the statute to pursue the course above stated, this could not affect the conclusion which I have reached, that the judge of the probate court may decline to decree a sale of lands for taxes when the description of the land is insufficient and void, even though no defense is interposed.

Very truly yours,

HUGH WHITE,
Special Assistant Attorney General.

TAXATION:—Cotton mill purchasing cotton for consumption not entitled to exemption to growers or purchasers for prompt shipment. Time limit for raising question of correctness of assessments.

August 26, 1921.

Hon. John S. Mooring,
Chairman, State Tax Commission,
Capitol:

My Dear Sir:

This will acknowledge receipt of your letter of August 15, 1921, with reference to the assessment of property claimed to be exempt under subdivision G of Section 2 of the Revenue Act of 1919, Acts 1919, page 283, which is as follows:

> Section 2: "The following property and persons shall be exempt from ad valorem taxation: (G) All cotton or other agricultural products which were raised or grown during the term of the preceding calendar year and which shall remain in the hands of the producer or of his landlord, or in the hands of the purchaser purchasing the same for prompt shipment."

You inquire whether or not a cotton mill purchasing cotton grown within the year for manufacture is entitled to the exemption.

You also submit a collateral inquiry as to whether the taxpayer can raise a question as to the correctness of his assessment after the close of the tax year.

Subdivision G or Section 2 grants an exemption to certain persons as to certain property and under familiar principles must be construed strictly. In order to avail himself of the exemptions the taxpayer must place himself within the terms of the statute strictly construed. It seems to me that the purchaser of cotton for the purpose of consumption is not a purchaser for prompt shipment. The exemption was evidently intended to benefit the farmer and the commission merchant. The exemption for manufacturers is provided under subdivision I of the same section. I am of the opinion, therefore, that a manufacturer of cotton is not entitled to the exemption under subdivision G.

As to the 2nd question: It is undoubtedly true that for some purposes the tax year is an entity and questions arising during a specific year must be settled during that year.

Blackshire v. State, 70 So. 965.

However, the permission granted to a taxpayer to recover taxes erroneously paid arises from Sections 2340 to 2347 of the Code of 1907 and I presume that the suit in question was brought thereunder. Section 2344 provides the following limitation as to time:

> "*Time within which petition must be filed*: No such claim shall be allowed and the money for same refunded unless the petition therefor shall be filed within four years from the date said payment was made to the county tax collector."

This provision applies to state and county taxes and Section 2347 provides a limitation of six years in cases of special assessments for municipal and school purposes and the like.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

TAXATION:—No exemption to concessionaires at county fairs from payment of licenses.

August 26, 1921.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 24th instant in which you make inquiry whether county fair associations can under the law as it now stands, grant concessions to street fairs and the like, to operate without licenses.

Chapter 45, Article 2 of the Code of 1907, being Section 2061 et seq., contains the provisions of the Code on the subject of exemptions from taxation.

An examination of the 1915 Revenue Act, Acts 1915, page 386, shows that in Section 2 of said Act, which covers ex-

emptions from taxation, the legislature covered the subject of exemptions from taxation which had previously been covered by Section 2061 et seq., of the Code, and added Section 5 thereof, the substance of Section 72 of the Code, providing in Section 287 of the said Act that all laws in conflict with the provisions of this Revenue Act were repealed.

It seems entirely clear to me that Section 72 of the Code was repealed by this 1915 Act which brought forward the same subject matter contained in said Section 72.

This Section 5 of the 1915 Act contains the following language:

> "No licenses or taxes of any character shall be collected by, or required to be paid to the State or any county or municipality therein, by any State or county fair, agricultural association, stock or poultry show, or from those who conduct business under contract with such fair, association or show, on premises owned or controlled by it during the annual fairs or exhibits of such association."

The revenue Act of 1919, Acts 1919, page 284, Section 2 (h) brings forward that provision of the 1915 Act to the effect that no licenses or taxes of any character shall be collected by or required to be paid to the State or any county or municipality therein by any State or county fair, agricultural association, stock or poultry show. The 1919 Act made no change in this provision except that it provides that franchise taxes provided for in Section 229 of the Constitution of Alabama shall not be exempted.

A very significant fact, and one which is decisive of the question here involved, in my judgment, is that while the 1919 Act brought forward the above mentioned exemption in favor of the fairs themselves, the 1919 Act did not bring forward, but omitted that language which appears in the 1915 Act to the effect that there should be an exemption in favor of those "who conduct business under contract with such fair, association or show."

It will be noted that Section 2 of the 1919 Act is captioned "Exemption from Taxation," and that Section 426 of the 1919 Act provides that "all laws and parts of laws in con-

flict herewith be and the same are hereby repealed." The effect of this repealing clause is to nullify and strike down any provision in previous statutes on the subject of exemption from taxation and to render of no effect that provision in the 1915 Act which undertakes to exempt persons operating concessions under contract with such county fairs, etc.

The 1919 Act brings forward the exemption in favor of county fairs themselves as it appears in the 1915 Act, but does not bring forward the exemption in favor of persons operating concessions under contract with such fairs.

My conclusion is that the 1915 Act repeals Section 72 of the Code and that the 1919 Act supersedes and repeals Section 5 of the 1915 Act, and that Section 2, subdivision (h) of the 1919 Act is the full and complete statement of the law on this subject. It necessarily follows, in my judgment, that there is an exemption in favor of county fairs, agricultural associations, stock and poultry shows, but there is no exemption in favor of persons who may operate concessions under contract with such fairs, etc.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

TAXATION:—Penalties not assessed for failure to pay tax when Commission made no assessment until balance sheets were furnished.

September 8, 1921.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My Dear Sir:

On August 8th, 1921, you submitted to this office an inquiry as to the collectibility of penalties on franchise taxes in cases where the corporation had declined to furnish balance sheets and the Commission had made no assessment until the balance sheets were furnished.

This inquiry raises a great many collateral questons which we have found it impossible to settle at this time. However, upon consultation, the Attorney General and I

are of the opinion that since statutes imposing penalties must be strictly construed it will be impossible for the State Tax Commission to collect penalties for failure to pay the tax under Section 24 of the Revenue Act of 1919, until the commission has done everything requiring of it with reference to determining the amount of the taxes.

Chauncy v. Wass, 35 Min. 1; 30 N. W. 126.

Gallup v. Smith, 154 Ind. 196; 56 N. E. 443, 450.

Very truly yours,

MARION RUSHTON,

Special Assistant Attorney General.

COUNTY ROAD BONDS:—Voted to be issued at certain rate of interest, cannot be sold below par so as to produce higher rate.

September 20, 1921.

Hon. W. S. Keller,
State Highway Engineer,
Bell Building,
Montgomery, Alabama.

My Dear Sir:

At an election held May 9, 1921, the qualified electors of Madison County, Alabama, authorized the Board of Revenue to issue "bonds for the sum of two hundred thousand dollars payable twenty years after their date bearing interest at the rate of five per cent per annum, payable semi-annually, for constructing public roads in and for said county." (The foregoing quotation is from the wording of the official ballot used in said election.)

The order of the Board of Revenue made April 4, 1921, provided for this election to "determine whether or not the bonds of the county shall be issued in the sum of two hundred thousand dollars to bear interest at the rate of five per cent per annum payable semi-annually and to run for twenty years from the date of issuance," etc. The notice given of the election, called by this order followed the exact wording of this ordinance passed by the Board of Revenue.

This office is requested to advise whether or not the Board of Revenue is authorized to sell five per cent bonds authorized at this election below par. County bonds cannot be issued by the governing body of the county unless such issue

is first authorized by a majority vote by ballot of the qualified voters of the county.

Constitution of Alabama 1901, Section 222.

The Board of Revenue, therefore, would have no legal right to issue and sell any bond except the exact character of bond to which the majority of the qualified voters consented in such election.

Wallace v. Ball et al, 88 So. 442.

The resolution of the Board of Revenue calling the election to determine whether or not these bonds should issue, the notice of the election which the law requires to state "the maximum rate of interest proposed to be paid" (Code 1907, Section 160), and the ballot used at the election each assured the electorate that the issue would be bonds bearing interest at not exceeding five per cent per annum.

If the Board of Revenue sold these bonds bearing five per cent per annum at a discount then the people of Madison County would be paying a greater rate of interest than five per cent per annum on the funds which the county actually received.

Weakley et al v. Henry, County Treasurer, 86 So. 46.

It is true that under the provisions of an Act approved October 8, 1920, the governing body of a county is authorized to sell bonds under certain conditions below par, but the conditions permitting such sale at a discount do not exist in the case under consideration.

Acts Special Session 1920, page 116.

This Act would conflict with the spirit of Section 222 of the State Constitution if construed so as to empower the governing body of a county to sell at a discount bonds bearing the maximum rate of interest authorized by the election. Such a construction would nullify the power of the electorate to limit the rate of interest to be paid on the money actually received by the county.

In my opinion the Board of Revenue of Madison County are not authorized to sell at a discount the aforesaid bonds so as to bear five per cent per annum on their face value.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COUNTY SUPERINTENDENT OF EDUCATION:—Is an employee of County Board, under contract, and terms of contract may be altered so as to increase his compensation during time for which he is appointed.

September 23, 1921.

Hon. Jno. W. Abercrombie,
Department of Education,
Capitol.

My Dear Sir:

Your request dated 23d instant for the opinion of the Attorney General upon the question "whether county boards of education have authority to increase the compensation of the county superintendent of education during the time for which he may have been appointed or elected," has been received.

The Attorney General has referred your request to me and I beg to advise you as follows:

Educational matters affecting counties are placed under the control of the county board of education, and the general administration and supervision of the public schools and of the educational interests of each county, with the exception of cities of two thousand or more inhabitants, are vested in such county boards, except as is otherwise provided by law.

General Acts of 1919, pp. 570 and 582.

The county board of education, except as is otherwise provided by law, has entire control of such public schools of each county in the State.

General Acts 1919, pp. 582-588.

The proceeds of special county school taxes are required to be turned over by the tax collector to the county treasurer of school funds, whose duty it is to receipt therefor and pay out the same on monthly pay rolls with the authority and approval of the county board of education. Such special county school tax funds may be used and paid out by the county board of education for any school purpose that is included within the purposes for which such special county tax was voted by the people of the county.

General Acts of 1919, pp. 607-613.

The local tax bonus fund which is paid out of the special legislative appropriation for that purpose, may be expended by the county board of education as in the opinion of said county board will best promote the cause of education in said county.

General Acts of 1919, pp. 613, 614, 799, 800.

The county board is authorized and required to appoint as its executive officer a county superintendent.

General Acts of 1919, page 583.

The county superintendent must be a trained educational expert, possessed of skill and experience, and he must be appointed for a term of from two to five years.

General Acts of 1919, page 588.

There is no limitation placed upon the amount of the annual salary which the county board may contract to pay such county superintendent of education, except such salary shall not be less than $1500. The county board has the authority and power to remove the county superintendent for immorality, misconduct in office, incompetency, or wilful neglect of duty, or when, in the opinion of the county board of education, the best interests of the schools require it.

General Acts of 1919, page 589.

The law contemplates that the county board, subject to the requirements of the statutes, should carry on their business somewhat after the fashion of a body of directors charged with high and responsible duties in governing the affairs of a large private corporation. Or perhaps it is better to compare such county board with the councilmen charged with the duty and resposibility of directing the high and responsible duties of a municipal corporation. Of course, in making any comparison, it must be understood always that the county board has such authority only as is conferred upon it by law. The statute expressly provides that the county board shall observe the rules generally adopted by deliberative bodies for their government. It is plainly the intention of the law that a record should be

kept by the county board of all important matters acted upon by it.

While the law says that the board must appoint the county superintendent for a term of from two to five years, it does not provide that when the salary of the county superintendent is fixed by the board, the salary must be fixed for any particular number of years. It is plainly the intention of the law that, subject to the minimum salary, the county board may contract to pay the county superintendent such salary as it sees fit in the exercise of a reasonable discretion. It is, I think, plainly the intention of the law that the county board may reconsider any action taken by it and take new and different action relative to any subject matter with which it is authorized to deal, if in so doing, it does not violate any provision of law, or any contractual obligation.

It does not appear, therefore, that there is any statutory barrier to the county board of education increasing the compensation of the county superintendent of education during the time for which he may have been appointed or elected.

A correct answer to the inquiry therefore depends upon whether such action by the county board of education will be in violation of Section 281 of the Constitution of 1901, which reads as follows:

> "The salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof, shall not be increased or diminished during the time for which he shall have been elected or appointed."

Whether such action by the county board of education is prohibited by this section of the Constitution depends, in my opinion, upon the question whether the county superintendent of education under the present provisions of law is an officer holding a civil office under the State or any county thereof, within the meaning of this section.

It is my opinion that the county superintendent of education under our present law is not an officer within the meaning of this provision of the Constitution. Whether he is such an officer must be determined by an examination of

the law which provides for his appointment and election and which prescribes the nature of his relation to the State and county and which defines the duties which he is given to perform. Such law is set out in Article 6 of the present school code.

General Acts of 1919, pp. 588-593.

A correct analysis of said Article 6 of the school code shows, I think, without doubt, that the county superintendent of education is not now an officer within the meaning of this provision of the Constitution, but is an employee of the county board of education, who acts as the chief executive officer of such board. His relation to the State and county is fundamentally different from what it was when he was elected by a vote of the people to fill an office for a definitely prescribed term at a definitely prescribed compensation. Under the present law the term for which he shall serve cannot be said to be fixed, although the law provides that he must be appointed or employed for not less than two nor more than five years. Neither is his compensation fixed although it is provided that he must be paid the annual salary of not less than $1500. He is not the agent of the State or county but is the executive officer of the county board of education.

State v. Sanders, 187 Ala. 79, 87.

Although said Article 6 of the school code does not in words say that he is an employee of the county board of education, it is plain that the language is tantamount to this, and it is a matter of common knowledge that the relationship between the county superintendent and the county board is contractual, and a form of such contract is prescribed by the State Department of Education. It is now well settled that there is no contract, either expressed or implied, between a public officer and the government whose agent he is.

State v. Sanders, supra.

The fact that the county superintendent is required to take the oath of office prescribed by the Constitution and to give bond is not sufficient to indicate that it is the intention

of the legislature that he be regarded as such an officer as is referred to in Section 281 of the Constitution.

Harrington v. State, 200 Ala. 480, 481.

A public employment may be created by law or by contract, but a public office can never be created by contract.

Harrington v. State, supra.

The two decisions, State v. Sanders and Harrington v. State, of our Supreme Court above cited, are, when the nature and character of the relation which the county superintendent now sustains to the State and county is considered, conclusive of this question.

Let us assume, for illustration, as to the real nature of the county superintendent's relation to the State and county that after a county superintendent has been appointed and employed for a period of three years and having served one year, resigns his employment and his resignation is accepted. Then when the county board took up the matter of appointing an employee as his successor, would the board under the law be required to appoint and employ such successor for a period covering the remainder of the unexpired time included in the period of employment of the one who had resigned? It is plain that the board would not be required under the law to do this, but might contract with the new superintendent for such period as they saw fit within the limits fixed by statute.

In fact if there is anything plainly shown as to the intention of the legislature in this respect, it is that the county superintendent shall no longer be any qualified voter of the county who can by his cordial hand-shaking and his winning ways corral enough votes to elect him to the office, but he must be a trained educational expert who may come from any quarter of the globe and shall be employed by the county board of education because of his skill and for such term as they see proper to fix within the limits of the statute, and shall be paid such compensation as they deem proper to pay him provided it must not be less than $1500 per year.

In view of the above it is my opinion that a county board of education has authority to increase the compensation of

the county superintendent of education during the time for which he may have been appointed or elected.

Very truly yours,
HUGH WHITE,
Special Assistant Attorney General.

PHYSICIAN'S CERTIFICATE:—Holder of pro forma certificate from state reciprocating with Alabama may be granted certificate without examination on presentation of proper evidence.

October 3, 1921.

Dr. S. W. Welch,
State Health Officer,
Montgomery, Alabama.

My Dear Sir:

This will acknowledge receipt of your letter of June 28th, making the following inquiry:

> "A native Alabamian formerly a surgeon in the United States Navy who holds a *pro forma* certificate from the States of North Carolina and Virginia, which states have reciprocal agreements with the State of Alabama as to the admission of applicants to the practice of medicine, is now an applicant for a certificate by reciprocity. May such certificate be issued without examination?"

Your inquiry calls for an interpretation of Sections 1634 and 1636 of the Code of 1907. Section 1636 was amended by the legislature of 1919, Acts 1919, page 851; however, it still applies only to persons holding at the time of application the rank of a surgeon or assistant surgeon in the United States army, navy or public health services. It will not, therefore, be of assistance in the present case. The vital part of Section 1634 so far as this case is concerned is as follows:

> "When such reciprocal relations have been established a certificate of qualification may be issued without examination to a person who presents evidence that he has complied with the requirements of a reciprocating state board of medical examiners; provided that

on the face of such certificate a statement shall appear that it was issued *pro forma,* and without examination."

From this it appears that a *pro forma* certificate issued by a reciprocating state board of medical examiners would be sufficient to entitle its holder to a similar *pro forma* certificate in this state. Under rule 4 of the rules governing "reciprocity" adopted by the Alabama State Board of Medical Examiners, it would seem, however, that the mere presentation of a *pro forma* certificate from a reciprocating State is not sufficient. The applicant "must also furnish a formal application from the original state granting his license." In other words, the State Board of Examiners requires the applicant to go back to the original state which had first admitted him to practice.

A definite answer to your inquiry will depend upon whether the applicant can furnish proper papers from the first state which admitted him to the practice of medicine.

I leave the question as to the conflict between the provisions of Section 1634 and the rules of the State Board of Examiners unanswered for the present.

Very truly yours,
MARION RUSHTON,
Special Assistant Attorney General.

PUBLIC HIGHWAYS:—County may contract with Highway Commission for building of road, but must deposit in State treasury sum required as condition for State aid.

October 13, 1921.

Hon. W. S. Keller,
State Highway Engineer,
Capitol.

My Dear Sir:

Re: Alabama Federal Aid Project No. 104; Etowah County.

Two questions are asked relative to this project, to-wit: First, can a county contract with the State Highway Commission to construct a road in the county, and second, if the county enters such contract is it required to pay into the

State Treasury the sum required by the Highway Commission as condition for state appropriation?

The Act approved September 22, 1915 (Acts 1915, page 573), provides, so far as relates to the first question, as follows:

> "Courts of county commissioners, boards of revenue or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the State. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts or boards, to build, construct, make, improve and maintain a good system of public roads, bridges, and ferries in their respective counties, and regulate the use thereof."

There is no local or special law limiting the authority of the Etowah Court of County Commissioners relative to contracting for road improvement or construction. The power vested in such court is about as broad as language can make. It seems to follow without doubt that the county was empowered to enter into any contract such court deemed advisable to construct roads. If the court of county commissioners of Etowah County deems it advisable to enter into the contract with the State Highway Commission to build a public road in Etowah County, in my opinion said court would have full authority to do so.

Section 11 of the Act creating the Highway Commission provided:

> "If it deems best, the Commission may condition said appropriation upon the appropriation by the county for said work of an amount fixed by the commission, which shall be paid into the State Treasury to the credit of the State Highway Fund before the work begins."

It is clear that if the Commission conditions the appropriation of the state funds to a project upon an appropria-

tion by the county, that the county must deposit the amount the county is to contribute in the State Treasury prior to the beginning of the work.

Acts 1919, page 895.

Our attention has been called to the work done by Pike County without such deposit. This work was done by force account and *not conditioned on an appropriation by the county.* It was proposed in the Talladega County project, which never materialized, that the county could be relieved of the deposit by conditioning the state appropriation upon the county agreeing to construct the road at seventy-five per centum of the estimated cost.

This office has never held that where the State appropriation was conditioned upon a county appropriation the county could be relieved of making the deposit with the State Treasury. The pending highway bill makes such provision, but it is not now the law.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

DISTRICT SCHOOL TAX:—Board of education of town between 1,000 and 2,000 may request court of county commissioners to call election for special tax, and, if tax is voted, may issue interest-bearing warrants against proceeds.

October 20, 1921.

Hon. Jno. W. Abercrombie,
Department of Education,
Capitol.

Dear Sir:

Your letter of the 18th instant addressed to the Attorney General requesting his opinion upon the following question has been received:

> "I wish to be advised whether boards of education of towns of 1000 to 2000 population that have passed from the control of the county board of education under the provisions of Section 1, Article 8, of the School Code have authority to request the County Board of Revenue, or other governing body, to call an election

to determine whether a special school tax shall be levied in said town under the provisions of Article 12 of the School Code; and whether said boards of education may legally issue and sell interest bearing warrants against the proceeds of said special school tax if authorized by said election."

In reply I beg to advise you as follows:

Any town in this State having a population of 1000 and less than 2000 has the power through its council or other governing body to elect a board of education of five members to exercise the government and control of the schools in such town in the same manner as is provided for cities of 2000 or more inhabitants, under the provisions of the school code.

Section 1, Article 8, General Acts of 1919, page 595.

It is true that under the terms of said Section 1, Article 8, it is stated that a board of education of such town of 1000 and less than 2000 inhabitants is empowered to exercise the government and control of the schools in such town in the same manner as is provided *in said Article* 8 for cities of 2000 or more inhabitants. However, under Section 6 and Section 25 of said Article 8 (General Acts of 1919, pages 596, 600), said Article 8 provides that a city board of education is vested with all powers necessary or proper for the administration and management of the free public schools within such city subject to the provisions of the school code, and such board is required to perform such other duties as are assigned to it elsewhere in said school code.

Under the above named provisions, it is my opinion that when an incorporated town of from 1000 to 2000 population exercises its right to have its own municipal board of education, such board becomes at once invested with all power and authority and charged with all duties and responsibilities, imposed by the school code upon the board of education in cities of 2000 or more inhabitants in this State.

It therefore follows under the provisions of Sections 1, 3, 7 and 8 of Article 12 of the school code (General Acts 1919, pages 607-613), that the town board of education of such town of 1000 to 2000 population has the authority to

request the county board of revenue or other governing body of the county, to call an election to determine whether a special school tax shall be levied in said town under the provisions of Article 12 of the school code. This position is further strengthened by virtue of the fact that the authority of the county board of education to request the court of county commissioners or other governing body to order a district school tax under said Article 12 is limited to the school districts in the county under the control of such county board of education.

Section 1, Article 12, General Acts of 1919, page 607.

The language of Section 7 of said Article 12, with respect to the issuance and sale of interest bearing school warrants against the proceeds of a special school tax is that "the board of education of any county or of any city of 2000 or more inhabitants, according to the last or any succeeding Federal census, * * * is hereby authorized and empowered to issue school warrants, etc." This section, however, further provides that all such warrants shall be signed in the name of such board, by its president, which language can be reasonably referred in the present matter only to the board of education of the town and its president.

It must be remembered, however, that under the provisions of Article 8 of the school code the board of education of the town of 1000 to 2000 population is given like powers and authority and charged with like duties to those of the boards of education of towns or cities of 2000 or more inhabitants and hence said Section 7 must be construed to apply not only to a city of 2000 or more inhabitants, but also to a town of 1000 to 2000 population where the latter has elected its town board of education in the manner stated in Section 1 of said Article 8.

In view of all the above it is my opinion that the board of education of such town of 1000 to 2000 population may legally issue and sell interest bearing warrants against the proceeds of its special district school tax, if authorized by said election held to determine whether such special school tax should be levied in said town.

Yours very truly,

HUGH WHITE,

Special Assistant Attorney General.

JUVENILE COURT:—Judge may not appoint a substitute, where law does not so expressly provide.

October 21, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Capitol.

Dear Madam:

You ask whether the judge of the juvenile court of Montgomery County has authority to appoint a substitute judge in the event of his absence or inability to act.

The Act creating the juvenile court of Montgomery County, Acts Special Session 1920, page 76, contains no provision for the appointment of a temporary or special judge of that court, nor in my opinion can authority for such appointment be found in Section 4627 of the Code of 1907. This code section was enacted in compliance with Section 160 of our Constitution and by its special terms applies only to courts of "general jurisdiction." The juvenile court is not one of general jurisdiction. In *ex parte* Roundtree, 51 Ala. 42, at 44, Judge Brickell, speaking for the court, said:

> "The division of courts, recognized at common law, was superior, or courts of *general* jurisdiction, and inferrior, or courts of *limited* jurisdiction. Superior courts derived much of their jurisdiction from the common law. Inferior courts derived their whole existence and jurisdiction from the statutes constituting them. Hence, nothing was intended to be without the jurisdiction of a superior court, whether of appellate or original jurisdiction, except what appeared to be so; and every presumption consistent with the record, was indulged in favor of the regularity and validity of their judgments; while, of inferior courts, no intendment was made favorable to their jurisdiction, and a conformity to the law of their creation must have been disclosed by their records. Such was the only division of courts at common law—into superior and inferior. It followed from the character of jurisdiction the courts exercised, and not from the subjection of the court to the appellate power of another tribunal. In this last sense, all courts of original jurisdiction are

inferior to a court exercising over them appellate power."

The juvenile court of Montgomery County is of course limited as to the subject matter which may be brought before it; namely, neglected or delinquent children and those responsible for them, and hence is not a court of general jurisdiction.

It is a well settled principle that judicial power cannot be the absence of authority conferred by law.

23 Cyc., page 601.

I advise you, therefore, that the judge of the juvenile court of Montgomery County has no authority to appoint a substitute judge.

Yours very truly,
MARION RUSHTON,
Special Assistant Attorney General.

BURIAL GROUND:—On private premises, not to be abated as a nuisance.

October 21, 1921.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

It appears from the attached letter that a negro who has a home in the heart of Phenix City has been using his back yard for the purpose of burying his dead for the past 43 years. Some of his near neighbors who use water from wells on their premises are bitterly objecting to this practice, fearing, I presume, that the dead bodies cause some contamination of the water in the wells. The mayor of Phenix City asks whether the negro can be compelled to cease using his back yard for a burial ground.

Among all peoples and in all ages the burial place of the dead has been considered sacred ground and protected by its very character from invasion or desecration. The Taj Mahal of India, the pyramids of Egypt, the Indian mounds of America, simple stone slabs, a few piled up rocks,

and crudely carved wooden boards are all enduring evidences of the reverent regard of people for the resting places of their dead. As stated by our own Supreme Court, "The sound sentiment of all civilized peoples regards the resting place of the dead as holy ground." And in another opinion of our Supreme Court it is said, "People have so much respect for the final resting place of the dead, and there is so little to tempt one to disturb their repose, cases are of rare occurence where such disturbances have become the subject of litigation and the adjudication of courts."

Kerlin v. Ramage, 76 So. 360.
Bessemer L. & I. Co. v. Jenkins, 111 Ala. 136; 18 So. 565.

The private family burial ground probably antedates the public cemetery. The latter doubtless had its origin in more modern times after towns and cities were builded. There is no more common sight on any of our country roads than the small family cemetery which may be seen here and there among a cluster of trees. They are no nearer human habitations nor more likely to contaminate the water supply than the public cemeteries in crowded and closely built cities.

The first real estate transaction recorded in Holy Writ concerns the purchase by Abraham from the sons of Heth, for four hundred shekels of silver, of a burying place for his wife, Sarah. It was in this family burial place—the cave of Machpelah in the land of Canaan—that Abraham and Sarah, Isaac and Rebekah, and Leah were buried. And Jacob, when he was ready o be gathered to his fathers, called his sons to his bedside and begged them to bury him with his fathers in the cave of Machpelah. Samuel was buried in his house at Ramah and Manasseh was buried in the garden of his own house, in the garden of Uzza. Deborah, Rebekah's nurse, was buried beneath Bethel under an oak. The bones of Saul and his sons were buried under a tree at Jabesh. The thirty pieces of silver which bought the betrayal of Christ were afterwards used to purchase the potter's field, to bury strangers in.

I mention the above instances merely to show that from the earliest times cemeteries, and particularly private burial places, have been regarded as property entitled to peculiar

protection and care. In Bessemer Land & Improvement Co. v. Jenkins, supra, our Supreme Court says:

> "When one buries his dead, therefore, in soil to which he has the freehold right, or to the possession of which he is entitled, it would seem there is no difficulty in his protecting their graves from insult and injury, by an action of trespass against a wrongdoer."

See also:
11 C. J., page 65.
Deavers v. So. Ex. Co., 76 So. 288.

In the case inquired about the negro has buried his dead in his own yard on his own property. In doing this he has exercised a right which has been exercised by mankind since the beginning of time. If, however, this private burial ground is so conducted and maintained as to constitute a real menace to public health, appropriate proceedings may be brought by the county board of health and the county health officer to abate it as a nuisance.

Acts 1919, page 942.
Opinions Attorney General, 1918-20, page 321.

A private burial ground is not declared by the public health law to be a nuisance per se (Acts 1919, p. 941).) In my opinion, therefore, it will require very strong and conclusive proof to induce any court to abate a burial ground as a nuisance.

Yours truly,
HENRY P. WHITE,
Assistant Attorney General.

TAXATION:—County warrants not accepted by the collector in payment of taxes.

Hon. J. H. Hill, November, 3, 1921.
Tax Collector,
Decatur, Alabama.

My Dear Sir:

Replying to your inquiry as to whether or not you are authorized to accept county warrants in payment of county taxes I beg to advise you as follows:

In the absence of a special enactment authorizing it the tax collector has no authority to receive warrants on the county treasury in payment of taxes due him.

Burke v. Armstrong, 52 Ala. 48.
34 Cyc. 656.
37 Cyc. 1162.

See also dicta in Shelton, Tax Collector, et al., v. Blount County, 51 So. 563 at 564.

I have been unable to find any provision in the Revenue Act of 1919 which permits the payment of county taxes with county warrants nor have I been able to discover any local statute applying to Morgan County authorizing such a procedure.

It is probable, however, that your local solicitor, being familiar with the local legislation applying to your county, will be able to cite you to such local legislation. Whether or not a local Act permitting the taxpayers of a single county to pay their taxes in this manner will be in violation of subsection 15 of Section 104 of the Constitution of 1901 is a question which for the present I leave unanswered.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

DISTRICT SCHOOL TAX:—When district has been divided into three by towns therein acquiring population of 2,000, prorating of district funds should date from publication of census figures.

November 8, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The following opinion is supplementary to the opinion dated October 20, 1921, addressed to you by the writer in response to the letter of Hon. E. A. Henry, Assistant Examiner of Accounts. This supplementary opinion is made necessary because of further inquiry by Messrs. Tillman, Bradley & Baldwin, Attorneys for the City of Fairfield in

regard to a proper division of the special school district taxes for the year 1920, between District 14-A, City of Fairfield and town of Brighton, in Jefferson County, Alabama.

The letter from Messrs. Tillman, Bradley & Baldwin, dated November 3, 1921, by their Mr. J. D. Rucker, states that, as they understand former opinion of October 20, 1921, in this matter, I was in error as to the facts upon which that opinion was based in one respect, namely: That instead of the warrants having been issued before Fairfield became a separate school district by operation of law and by virtue of its increased population, the warrants with the exception of $610 were all issued "after the City of Fairfield attained a population of more than two thousand, as evidenced by the 1920 Federal census." With their letter containing such statement, Merrs. Tillman, Bradley & Baldwin enclose a copy of statement furnished and certified by Mr. R. D. Hewitt, Clerk of the County School Board, showing the outstanding warrants against school district 14-A. They also enclose copy of an agreement heretofore executed by the County Board of Education, the City of Fairfield and the town of Brighton, which was executed for the purpose of reaching an adjustment of these matters.

It appears from Mr. Ruckner's letter, taken in connection with the statement showing the outstanding warrants against this school district, that he takes the position that the law making the city of Fairfield and the town of Brighton each a separate school district by virtue of its having attained a population of two thousand or more became effective as of the date January 1, 1920, because it appears from said statement that outstanding warrants in the amount of only $610 had been issued prior to January 1, 1920.

I cannot agree with this view of Mr. Rucker.

> "In the absence of a statute requiring any formal action by the census board or the legislature, a census goes into legal effect, as such, on its compilation and *publication* by the census superintendent or board."
>
> 11 C. J. 71.
> Wolff v. Morehead, 98 Minn. 113.
> Childers v. Duvall, 69 Ark. 336.
> Green v. Narragansett, 29 R. I. 380.

Since the Act of March 3, 1919 (U. S. Compiled Statutes, 1919, Supplement, Secs. 4385 to 4419), under which the last of fourteenth decennial census was made, has no provision fixing a date on which the census should become effective, then the rule of law above stated will govern, and in the present case Fairfield and Brighton became separate school districts upon the publication or announcement by the director of census of their 1920 population. By publication is not meant that the law would not take effect until the entire census of the population of the county had been published in bound volume. Any bulletin or preliminary announcement made by the director of census giving the population of a town is itself an official announcement of the census of which the courts must take cognizance.

I am not advised as to when the director of the census first made announcement of the population of Fairfield and Brighton under the 1920 census, but I assume that the date when such announcement was made can be ascertained from the director of the census. On such date Fairfield and Brighton became separate school districts. I am not advised as to when these two towns or either of them selected a city board of education after it had attained the population of two thousand and proceeded to take charge of its own school affairs under the direction and control of its city board of education.

The county board of education of Jefferson County, the city of Fairfield and the town of Brighton, through their officers who executed the agreement bearing date of ——— day of January, 1921, in regard to a division of the special school district taxes of said district, No. 14-A, appear to have fallen into error by assuming that the 1920 census with respect to making Fairfield and Brighton separate school districts became effective on January 1, 1920. The authorities on which I base such opinion are cited above.

Under Sections 7 and 8 of Article 12 of the school code, Acts 1919, pp. 611-613, it is my opinion that all warrants issued by the county board of education prior to the publication or announcement of the population of Fairfield and Brighton by the director of the census, under the 1920 census, constitute a preferred claim against the proceeds of the special district school taxes of the entire district

included in No. 14-A and an amount sufficient to retire those of such warrants falling due each year thereafter, should be retained by the tax collector and paid over to the county school treasurer for the retirement of such outstanding warrants, including the interest thereon, until all of such outstanding warrants issued by the county board prior to publication of the census of Fairfield and Brighton have been retired.

As I understand the provisions of the agreement executed by the county board of education, city of Fairfield and city of Brighton to provide for the distribution of the special district school taxes of said district 14-A, it appears to me that such agreement is in conflict with the express provisions of law set out in said Sections 7 and 8 of said Article 12 of the school code.

It would be a presumption of law that prior to the time when Fairfield and Brighton became separate school districts, the county board of education had expended all funds accruing to said district 14-A in such a manner that Fairfield and Brighton would have received their just proportion of such funds, as well as the outside contiguous territory in district 14-A. If Fairfield and Brighton received their due proportion of the proceeds of the warrants issued prior to the publication of their 1920 population, then it is only just and within the express provisions of the law that they should bear their part of the burden in the liquidation of such warrants. But whether these towns feel that they did receive their due portion of the proceeds of such warrants or not, it is my opinion that they are bound by the provisions of law set out in said Sections 7 and 8 of Article 12 of the school code.

Very truly yours,

HUGH WHITE,

Special Assistant Attorney General.

CONVICTS:—Convict Department not required to produce convicts on subpoena of Federal court.

November 10, 1921.

Mr. Wm. F. Feagin,
State Warden General,
Capitol.

Dear Sir:

You have referred to this office for advice thereon the letter of the Honorable G. W. Brown, Deputy United States Marshal, Birmingham, Alabama, in which are enclosed subpoenas issued out of the Federal Court at Birmingham directed to three convicts now confined by authority of the State of Alabama. You wish to know whether or not you must produce these convicts at the time and place specified in the subpoenas, and if you are required so to produce them, you wish to know how and in what manner you may expect to be reimbursed for the expense of guarding and transporting them.

As you are aware, this department has repeatedly ruled that there is no authority, statutory or otherwise, requiring the convict department to produce convicts as witnesses in civil trials, the statutory authorization contained in sections 6559 to 6561 and 7890 of the Code of 1907 being regarded as the exclusive method prescribed by the legislature for obtaining the testimony of convicts in both civil and criminal cases. This ruling has received the approval of the Court of Appeals in the recent case of State v. John Brown, 6 Div., No. 910, where the Court said: "It is clear that the lawmakers intended to state the entire law relative to obtaining the testimony of convicts and to make the method provided in these code sections exclusive."

The subpoenas forwarded to you are addressed to the convicts and not to the convict department or any of its representatives. I feel confident, therefore, that I am correct in advising you that you are not required to obey them. However, the question would more properly be presented if a writ of *habeas corpus ad testificandum* were issued by the Federal Court addressed to the convict department. If the attendance of these convicts can be compelled it seems to me that such a writ furnishes the only method. 40 Cyc. 2160, 2173.

The only Federal case which I have been able to find dealing with this matter is reported in 23 Federal 136 (United States v. Barefield), and has never been cited since. In that case upon application by the United States District Attorney for process of subpoena, attachment or otherwise, for a convict confined in a Texas penitentiary, the Court refused to issue such a writ and said: "This Court has no control over the volition of the State authorities in the matter of their bringing their State convicts before it to give testimony."

I therefore advise you that at least as long as this matter remains in its present status, you need take no steps toward producing these convicts at the trial specified. Your furtheir question as to expenses need not now be answered.

Very truly yours,

MARION RUSHTON,
Assistant Attorney General.

ALABAMA POLYTECHNIC INSTITUTE:—Trustees have authority to order that salary of deceased president be paid his widow for remainder of fiscal year.

November 18, 1921.

Hon. Thomas E. Kilby,
Governor of Alabama,
Capitol.

My Dear Sir:

In reply to the verbal inquiry as to whether or not the trustees of the Alabama Polytechnic Institute have the power to order that the salary of the President Emeritus C. C. Thach, now deceased, for the remainer of the fiscal year be paid to his widow I beg to advise as follows:

The Board of Trustees of the Alabama Polytechnic Institute was created by Section 266 of the Constitution of 1901 and given the full "management and control" of the institution. The Board of Trustees of the Alabama Polytechnic Institute has become incorporated under Sections 1899 to 1911 of the Code of 1907. Powers in furtherance of the object for which the board was created by the Constitution have been conferred by the legislature, Section 1902. Among these are:

> "To organize the institute by appointing a corps of instructors who shall be styled the faculty of the institute, and to appoint such instructors and other officers as the interests of the institution may require; and to remove such instructors or other officers, and to fix their salaries or compensation, and to increase or reduce the same at their discretion; * * * and to do whatever else they may deem best for promoting the interest of the institute."

An answer to the specific question asked depends upon a determination of two questions: (1) Is there any constitutional inhibition against the proposed appropriation? (2) Is the making of the proposed appropriation within the express or reasonably to be implied powers of the board as created by the Constitution and incorporated by the Code?

If there is any constitutional inhibition against such an appropriation it is contained in Section 97, which reads as follows:

> "Section 97. The legislature shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death."

Since the decision by the Supreme Court of the cases of State v. Sanders, 187 Ala. 79 and Harrington v. State ex rel. Van Hayes, 200 Ala. 480, it seems clear that an appointee of a board or commission vested with the supervision and management of state institutions is not an "officer" within the meaning of the Constitution and is not therefore subject to the inhibition of that instrument. It is true that these cases rest upon an interpretation of Section 281 of the Constitution and 1467 of the Code, rather than upon Section 97 of the Constitution, but the reasoning of both cases is such that the principle should undoubtedly apply to Section 97 as well.

There being no constitutional inhibition against such an appropriation the power of the Board of Trustees to make it is sustained in my opinion on three grounds.

First: As previously stated, the Board of Trustees is a creature of the Constitution by which it was given the full control and management of the Polytechnic Institute. When funds become unconditionally the property of this institu-

tion its trustees are vested with the exclusive direction thereof and their discretion cannot be questioned unless the purpose to which the money is applied is totally without the pale of possible benefit to the interests of the institution. Some of the funds over which the trustees exercise such exclusive control are: (1) the interest fund, (2) tuitions and fees, (3) the unconditional general appropriations for the maintenance and support of the institution. See Biennial Report of the Attorney General 1918-1920, page 445. If in the sound discretion of the Board of Trustees the proposed appropriation will be for the best interest of the Polytechnic Institute, it is undoubtedly within the powers of the Board to exercise its constitutional authority to make such appropriation.

Second: The powers granted the Board of Trustees by Section 1902 of the Code are very broad. That much is left to its discretion is indicated by the phrase "and to do of the institute." In my opinion, power to make the proposed appropriation may be based upon this clause provided whatever else they may deem best for promoting the interest of course it is the judgment of the board that such an appropriation will promote the interests of the institute.

Third: The power to appoint officers and instructors and to fix, increase, and diminish their salaries or compensation carries with it the power to pension them or their dependents. An apt illustration of how this power to pension is necessarily implied from the power to appoint and fix compensation is found in those cases which support the constitutionality of the pension laws of the United States.

It is a familiar principle that the Constitution of the United States is a grant of power. Every activity of the United States Government must look for its authorization to some phrase or clause of the Constitution. In this respect the United States Government is like the Board of Trustees of the Polytechnic Institute or any other corporation having written charter powers. In United States v. Fairchilds, 1 Abbot U. S. 74, it was said that the power to raise and support armies carries with the power to pension and give bounties to the soldiers in such armies. In the course of the opinion the Court said, at page 78:

> "Pensions and bounties are not given for the support of the army but are promised by way of inducement

and reward for the citizen becoming a soldier and faithfully serving his country. There is no express power given in the Constitution to Congress to give pensions and bounties to the soldiers. The right has been claimed however, and has never been doubted as being among those incidental and implied powers flowing from the expressly granted and enumerated powers to 'raise and support armies.'"

See also Walton v. Cotton, 19 Howard U. S. 355. 15 Law Edition 658.

In summary, I beg to advise that the proposed appropriation is not inhibited by any provision of the Constitution of Alabama, and if the proposed appropriation is, within the sound discretion of the board of trustees, for the best interest of the institute, the power of the board to make it may be supported by any of three grounds, namely; that the exclusive control of certain funds is by the Constitution placed within the discretion of the board, the general power conferred by Section 1902 of the Code supports it; and it is an implied adjunct of the power to employ and fix the compensation of officers and instructors of the institution.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

CONVICTS:—Fines may not be paid out after sentence has been imposed in lieu thereof.

November 25, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

You have referred to this office for answer a letter from the Honorable W. J. Merrill, Hard Labor Agent for Covington County, asking the following questions:

1. Has the State Warden General authority to order a hirer of county convicts to release them on short time?

2. May a hard labor agent receive a fine from a county convict after the convict has been sentenced to hard labor for non-payment of this fine and thereupon release him?

I.

Your first question is very indefinite, as you give none of the facts connected with the release of these convicts.

No officer or individual, except the Governor of Alabama in the exercise of his power to pardon or parole convicts, can release any convict before the expiration of the term for which he has been sentenced. On the other hand, it is a crime to detain a convict after the termination of his sentence. Code 1907, Sections 6610 and 6613.

The State Warden General has a right to inspect and inquire into the treatment of all county convicts and in the exercise of this right of supervision and inspection there is necessarily vested a large discretion in the State Warden General. I find no provision of the law requiring him to notify the county officials of any order releasing county convicts. The Honorable William F. Feagin, the present State Warden General, tells me that he has never claimed the power to shorten or lengthen the terms of convicts and that he has never made any order to such effect. Certainly such an order, if made before the expiration of the term for which the convict was sentenced, is of no effect.

II.

May a defendant fined by a jury and later sentenced to hard labor to pay the fine, be released from such hard labor upon payment of the fine? Code Section 7634.

This inquiry is to be distinguished from a similar inquiry which might arise as to costs. By Section 7635 costs or the unpaid balance of costs may be paid and the prisoner released at any time, even though by the sentence of the court costs have been turned into time. Bowen v. State 98 Ala. 83. The permission is given by this section; the person to whom the costs may be paid is designated; and provision is made authorizing the sheriff or hard labor agent to discharge the defendant upon certificate by the designated person that the costs or the balance due has been paid.

No such permission is given, nor machinery for the discharge of the defendant provided by Section 7634, which deals with fines. This section simply declares that if the fine is not paid, or its payment secured, the defendant *must* either be imprisoned in the county jail or sentenced to hard labor for the county, and the scale of imprisonment—

so many days for so many dollars—is established. There is nothing about discharge, nothing about "paying out" after such a sentence has been mposed. May a defendant who has been fined by the verdict of a jury and who has failed to pay the fine, and been sentenced therefore according to the scale of Section 7634, later pay the fine and be released?

An affirmative answer to this question is suggested by certain historical considerations and by dicta appearing in several Alabama cases. At the common law a defendant who failed to pay a fine assessed against him was ordered to stand committed until the fine was paid. Bishop Crim. Procedure, Vol. I, Section 1301. Such a system filled the jails with persons who had no money to pay fines assessed against them, and by imprisonment were deprived of the means of procuring any. It is said that the father of Charles Dickens was a victim of this system. Legislation was enacted to prescribe a limit for such imprisonment and to provide means whereby the prisoner through labor for the State could discharge his obligation. Such enactments furnished a humane and practical substitute for indefinite and hopeless imprisonment.

The argument derived from this bit of history is: since sentences to hard labor for the payment of a fine are in lieu of sentences to imprisonment "until the fine be paid," the hard labor sentence should possess the chief quality of its historical prototype and be dischargeable upon payment. By express provision and decision such is the effect of the California statute analogous to Section 7634 of the Alabama Code. *Ex parte* Baldwin, 60 Cal. 432. See 16 C. J. 1308. The California code provision reads:

> "A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine be satisfied in the proportion of one day's imprisonment for every dollar of fine." Code 1858, Section 1446.

In the Baldwin case, supra, it was held that a proper judgment under this section would be:

> "That defendant pay a fine of $50 and in case said fine be not paid by the——day of——— that defendant be imprisoned until the fine be duly satisfied, in the

> proportion of one day's imprisonment for every dollar of the fine, and on payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed that the defendant be discharged from custody."

Under this sentence, which it must be remembered is based on statute, the prisoner would be entitled to his discharge at the end of the first day of imprisonment on the payment of $49, at the end of the second day by the payment of $48, and so on to the last day of imprisonment.

There is some authority for suggesting that a sentence providing for the discharge of a prisoner upon the payment of the fine for which the imprisonment was imposed would be proper under Alabama statutes. State v. Jeter, 162 Ala. 3. In that case the county court made the following judgment entry:

> "The court, after hearing all the evidence in the case, finds the defendant guilty, and assesses a fine of $150 and costs, and in addition to the fine and costs sentences the defendant to hard labor for the county for three months. The defendant failing presently to pay or secure the fine and costs, he is sentenced to additional hard labor for the county 269 1-3 days, at 75 cents per day, to pay said fine and costs, which is $201.78. Should the defendant later pay fine and costs to the clerk, the sentence to hard labor to pay fine and costs will be remitted."

On habeas corpus Jeter was ordered discharged, on the ground that the judgment was not sufficient in form. The State appealed and the Supreme Court held the judgment sufficient.

However, in the case presented the sentence contains no provision that it will be discharged by payment. It is absolute and unconditional. Nevertheless an inferential authority for discharging such a sentence by payment is to be found in Ryan, Treas. v. Collins, 196 Ala. 478, 71 South. 690, where it was held that a fine paid after the defendant had been sentenced to hard labor therefor should be covered into the fine and forfeiture fund. The question under consideration here was not raised in that case, but it is worthy

of note that all courts proceeded on the assumption that the payment was legally made.

In *ex parte* Joice v. Smith, 88 Ala. 128, at 131, the court said: "Imprisonment as a satisfaction of the fine imposed has always prevailed in this State, and in every other country where an enlightened system of criminal jurisprudence obtains. It is the only practical alternative, where the defendant refuses to pay or secure the fine." In other words, imprisonment at hard labor is an alternative method placed in the hands of the state to enforce the verdict of the jury —namely that the fine be paid—and when the object for which the imprisonment was imposed is accomplished, justice demands that the prisoner be released.

These considerations led a former Attorney General to rule (Biennial Report 1918-20, page 393) that "the sentence to imprisonment or hard labor when the fine is not paid, or judgment confessed therefor, is merely an alternative to enforce payment and upon the payment of the entire fine, the convict is entitled to be released from the sentence therefor."

After careful consideration and consultation of the Alabama authorities we have been reluctantly forced to an opposite conclusion. Undoubtedly the conclusion arrived at in the previous opinion is the juster rule and should be the law. It is the law as to costs under the very plain terms of Code, Sections 7635 and 6584. However, despite their juxtaposition in the Code and the similarity of their subject matter, Sections 7634 and 7635 are not part of the same statute. They were enacted by different legislatures, and while they are to be construed so as to harmonize with one another, it has been held that it would be too strict a construction to interpret one by reference to the other. Williams v. State, 55 Ala. 166. The provision permitting discharge by payment cannot be read into Section 7634 by construction from Section 7635.

Even if the dicta and historical considerations advanced are of sufficient force to warrant a permission to the defendant to pay a fine which has been transmuted to hard labor, there is no machinery whereby his discharge is authorized. The sheriff or hard labor agent holds the defendant under sentence whch will not expire until a certain date, which sentence is absolute on its face; the court

has lost jurisdiction of the case by the lapse of thirty days from the imposition of the sentence (Acts 1915, p. 707). Who is to receive the payment; who is to issue an order which will protect the sheriff or hard labor agent in releasing the prisoner?

These considerations compel the conclusion that Section 7634, while it is a part of the humane growth of the law previously referred to *Ex parte* Joice v. Smith, 88 Ala. 128, 131), does not go so far as the California statute. Its true interpretation seems to be: after a prisoner is fined he may pay or secure the payment of the fine within a reasonable time, Code Section 7632 (but certainly within 30 days for after that time the court loses jurisdiction of the case), and by so doing he loses no rights of appeal. Burke v. State, 71 Ala. 377 (when fine is confessed). Johnson v. State, 172 Ala. 424 (when fine is paid). If the defendant does neither within the time allowed the court again takes the case in hand, makes further adjudication (Standfield v. State, 3 Ala. App. 54; 57 So. 402), that the fine has not been paid and turns it into hard labor according to the scale provided in the section (7634). After that, unless by a motion for reconsideration the case is kept before the court, on the lapse of 30 days the sentence cannot be changed and must be executed as made. The Alabama statute seems to contemplate a definite adjudication on the subject as to whether the fine is to be paid or worked out and thereafter the decision of the court governs.

In Kirby v. State, 62 Ala. 51 at 57, it is said: "The sentence of the court must clearly express the punishment the convict of crime is to suffer, and when it is so expressed, the sentence is authority for the infliction of that punishment only, and not for the infliction of another and different punishment."

In *ex parte* State in re Newton, 94 Ala. 431 at 433, the court said:

> "The general power of the court to set aside or modify its unexpected judgments, during the term at which they were made, in criminal cases, is not, and can not be denied. When a fine is assessed, and the fine and costs are not paid, nor judgment confessed therefor as provided by Section 4502, it is made the duty of

the court to imprison the defendant, or sentence to hard labor, as required by the statute. Under the statute, the court may impose the alternative punishment as a part, and in continuation of the entry of the judgment of conviction; or, if deemed proper, the court may have the judgment of conviction entered, and allow the defendant a reasonable time to pay the fine and costs, or confess judgment therefor; and on failure, may impose the alternative punishment at any time during the term. Either course is in pursuance of the statute. It may be that, when the court adjourns, without rendering judgment on a verdict of guilty, the suspension being at the instance of the defendant, it may pronounce, at the next term, the judgment which should have been pronounced at the previous term, as was held in Charles v. State, 4 Porter, 107. The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend *nunc pro tunc* for the purpose making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment can not be pronounced by piecemeal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that first imposed. People v. Felker, 61 Mich. 110."

A fine of $500 was assessed by the jury in Burke v. State, 71 Ala. 377, and the judgment entry recited: "And the same being unpaid or otherwise secured, it is the judgment of the court that the defendant perform hard labor for the county of Montgomery for the term of 140 days, to pay said fine, and for such additional term not exceeding eight months, at the rate of 30 cents a day, as will be sufficient to pay the costs of this prosecution." At this time (1882) the code section as to costs (Code 1876, Sec. 4731, which is the predecessor of Code 1907, Sec. 7635), did not permit the discharge of a defendant on payment of costs which had been transmuted to hard labor; in other words, at that time the provisions as to both costs and fines were on a parity with Section 7634 of the Code of 1907. On appeal counsel for the defendant insisted (p. 380):

"The judgment entry should be modified, even if there should be an affirmance. If the judgment is affirmed, according to its literal interpretation, the defendant must be subjected to hard labor for the county, although he pays the fine and costs immediately on the affirmance. Can this be the law? A defendant on trial for a misdemeanor has the right to reserve exceptions to the rulings of the primary court, and the right to review these rulings in this court. Code Sec. 4978. In such case judgment must be rendered on conviction, but its execution must be suspended, and the right to bail is given. Ib. Sec. 4981. On appeal this court renders such judgment on the record as the law demands.. Ib. 4990. Now, if the defendant pays the fine and costs, or confesses judgment therefor, he loses the right to revise the rulings of the court below; and if he does not pay or confess judgment, he must be sentenced to hard labor. Thus the defendant loses one right by exercising another; and, under this construction, one portion of the statute makes nugatory another. The proper construction must be one which will harmonize the statutes, one with the other; that, on affirmance in this court, the defendant still has the right to pay, and thereby avoid the alternative sentence; or else, this court, when it affirms, should so provide in its judgment of affirmance."

Replying to this argument Judge Stone, for the court said:

"In regard to the sentence to hard labor, imposed by the court as alternative punishment the statute expressly provides that if the fine and costs are not paid, or a judgment confessed with sureties, then the alternative sentence must be pronounced. Code of 1876, Secs. 4454-5. The City Court only pursued the statute. The hardship anticipated will not be found to exist, if persons, convicted of misdemeanors and fined, will confess judgment with the proper sureties. Such confession prevents the imposition of the alternative sentence; and if the judgment of conviction is reversed, the confessed judgment, having no foundation to rest on, falls with it."

In accordance with these authorities the former opinion of this office is withdrawn and the following holding is published: Where a defendant has been fined and the fine not being paid or confessed, the court sentences the defendant to hard labor for a certain period and the time for making or continuing motions has elapsed, there is no power in any person or officer except the Governor to receive payment of the fine imposed and to discharge the prisoner. The matter has become one for executive clemency alone.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

TAX ASSESSOR:—Proper custodian of tax records since 1915. Office equipment purchased by or with approval of Court of County Commissioners.

November 30, 1921.

Mr. Leonard G. McQueen,
Tax Assessor of Elmore County,
Wetumpka, Alabama.

Dear Sir:

Your request to the Attorney General for his opinion as to whether you are the proper custodian of all books or records pertaining to your office has been received. With this request you also ask the opinion of the Attorney General as to whose duty it is to provide your office with proper desks, book files, chairs and necessary fixtures. You also ask what remedy the tax assessor has in regard to procuring necessary office furniture and fixtures if the court of county commissioners refuse to purchase same for the office.

In reply I beg to advise you as follows:

The judge of probate is the custodian of all the permanent records of the tax assessor's office for the years from 1907 up to and including 1914.

Sections 2122, 2130, 2147, 2158, Code of 1907.

The tax assessor is the custodian of all such records for year 1915 and subsequent years as there is no provision of law that any other officer should have the custody of such

records. As the law does not provide that some other officer should have the custody of the records of your office, it necessarily follows that you are the custodian of such records since the records belong to your office. It is expressly provided that maps and plat books belonging to your office should be kept there except during such part of the year as your office may be closed.

General Acts of 1915, p. 412.
General Acts of 1919, p. 307.

The tax collector and assessor are authorized to purchase the necessary books and stationery and to contract for the necessary printing in their respective offices with the approval of the court of county commissioners.

Section 2359, Code of 1907.

It has been held that a typewriter would come within the meaning of the term stationery but I do not think such term has been construed to include desks, book files or such office equipment.

Underwood Typewriter Co. v. Marengo County Bank, 82 So. 158.

It appears from said Section 2359 of the Code that before you, as tax assessor, could bind the county even in the purchase of necessary books, stationery and printing, your proposed purchases of same must first have the approval of the court of county commissioners.

In my opinion you have no authority by virtue of the fact that you are county tax assessor to purchase such desks, book files, chairs and necessary fixtures and bind the county for same without your first having had the approval of the court of county commissioners.

Van Epps v. Commissioners Court of Mobile, 25 Ala. 460.
15 Corpus Juris, 545.

On the other hand the court of county commissioners have authority to purchase for a county officer such office equipment as is reasonably necessary to enable him properly to perform the duties of his office. Not only has such court the authority to make such purchase but it may properly be said that it is its duty to do so. It may be true that

the duty to purchase such office equipment for a county officer is not expressly stated in the statutes, but it is certainly implied.

Sections 3313, 3318, Code of 1907.

Your last question, namely, what remedy has the tax assessor if the court of county commissioners refuse to purchase such office equipment for him raises a question which is somewhat difficult to determine. As above stated, without the approval of the court of county commissioners you have no authority to purchase such equipment and bind the county therefor under an express agreement. That is, any person furnishing such office equipment would not be able to recover against the county by showing simply that you had bought the same for the county for use in your office. And although it has been held that a county may be liable for materials furnished to it even where there was no express contract for same, if the contract thus implied against the county is one which the county was by law empowered to make, still in a case of this sort the burden would be upon him who sought to recover from the county on such implied contract to show that such material had been voluntarily accepted by it. In my opinion the mere purchase of such office equipment by the tax assessor and the use of same by him would not be sufficient to show that there had been any acceptance by the county of such office equipment, and hence I do not think that the seller of same would be able to recover from the county upon an implied contract.

Montgomery County v. Pruett, 175 Ala. 391.

Unless the tax assessor could show that such office equipment was actually necessary for the discharge of the duties of his office, I do not think the seller of such office equipment could recover therefor against the county where the same was sold upon the order of the tax assessor. Even in this case, it will be necessary for the seller of same to file his claim with the court of county commissioners and then when the claim was disallowed he would have a right to file suit upon the same against the county.

Section 2472, Code of 1907.

Yours very truly,

HUGH WHITE,

Special Assistant Attorney General.

HIGH SCHOOLS:—Matriculation fee may not be in excess of $2.50 fixed by statute.

December 9, 1921.

Hon. John W. Abercrombie,
State Superintendent of Education,
Capitol.

My Dear Sir:

Your letter of the 7th instant requests the opinion of the Attorney General upon the following question:

> "Have principals of the county high schools in Alabama authority to collect from each pupil entering said schools as matriculation fee in excess of two dollars and fifty cents for each term?"

In reply I beg to advise you as follows:

In some instances the legislature has given to the school authorities of the state the right and authority to fix a reasonable fee to be paid by the pupil upon entering school.

Section 5, Article 7, General Acts 1919, page 594.

The county board of education, upon recommendation of the county superintendent of education is given authority to prescribe the conditions upon which pupils may be admitted to junior and senior high schools, but this authority is subject to the provisions of the school code.

Section 22, Article 5, General Acts 1919, page 587.

However, the Legislature instead of giving authority to the county board of education to fix a reasonable matriculation fee or incidental fee to be collected from each school child entering the county high school fixed the amount of said fee itself.

Neither the principal of the county high school nor the county board of education has authority to contravene the specific direction of the Legislature in this or any other matter. And where the Legislature in one and the same Act, in one instance left it to the discretion of the school authorities to fix such an incidental fee, but in another instance, as the present, saw fit to fix the amount of such fee itself, I think it is plain that it was the intention of the legislature that the amount of the fee here fixed should con-

trol, and that neither the principal of the county high school, nor the county board of education have authority to vary therefrom.

Section 7, Article 24, General Acts 1919, page 642.

Yours very truly,
HUGH WHITE,
Assistant Attorney General.

DENTISTS' LICENSE:—Renewal fee should be paid for each year of practice within State, plus penalty for each year of failure to pay. Renewal after lapse of non-practice does not entail payment for years of lapse.

December 9, 1921.

Hon. H. Clay Hassell,
Secretary-Treasurer,
Board of Dental Examiners,
Tuscaloosa, Ala.

Dear Sir:

The Attorney General has referred to me your letter of the 1st instant.

The first inquiry contained in your letter is as follows:

> "If a dentist, who has been granted a certificate or license by the Board of Dental Examiners, fails to pay his renewal fee, as provided in Section 2 of the Amended Dental Act of 1919 for one or more years, during which time he continues to practice in this State, is the Board correct in exacting from him two dollars for each year that has elapsed plus the penalty of ten dollars?"

In reply to this inquiry I beg to advise that I am of the opinion that the registration fee of $2.00 and the penalty of $10.00 should be collected for each year in cases in which the failure to obtain such certificate has extended over a period of more than one year.

In your second inquiry you ask, "Is one who has been out of practice or living out of the State and has failed to

renew his license entitled, after a lapse of one or more years, to a renewal on the payment of ten dollars plus the two dollars renewal fee for the current year?"

Acts 1919, page 785, Section 2, provides that on or before the first day of October of each year every licensed dentist shall register his or her certificate with the said board according to regulations formulated for same by said board and shall receive from said board a certificate of registration which certificate of registration *"shall be his or her authority from said board to practice dentistry in this state,"* etc.

I am of the opinion that if a dentist should be practicing in this State and remove to another state, remaining there for a period of years and should then return to Alabama for the purpose of re-entering the practice in this State, there would be no obligation resting upon him to pay the registration fee for any year other than the current year in which he seeks to engage in the practice, and that if his registration fee should not be paid within the 60-day period, he should pay the $10.00 penalty also.

With reference to your third inquiry the statute provides that in case of default in payment of such fee of $2.00 for a period of 60-days the license certificate shall be automatically revoked.

The question as to whether payment should be considered as having been made within the 60-day period when a check has been mailed within that period, but has not reached you, is, I think, a matter of policy which should be passed upon by the dental board.

If there is any further service which we can render you in this connection, please advise.

Very truly yours,

LAMAR FIELD,

Assistant Attorney General.

PUBLIC UTILITY COMPANY:—Petition for permission to change capital stock to stock without par value and also to issue preferred stock should be supported by ample proof that value of property justifies such issues.

December 9, 1921.

Hon. S. P. Gaillard,
Member Public Service Commission,
Capitol.

Dear Sir:

You request the opinion of the Attorney General on the following question, namely:

Is the Public Service Commission authorized to issue a permit to the Mobile Gas Company to create a new issue of $1,000,000 of 8 per cent cumulative preferred stock, not to be paid for in money, services or property, but to represent the supposed excess value of its properties over and above the present outstanding $600,000 of capital stock? You enclose with your request for this opinion a copy of the company's petition asking the Commission to grant it permission to issue such stock.

In reply I beg to advise you as follows:

Reference to the petition of the Mobile Gas Company to the Alabama Public Service Commission shows that the company has asked permission to change its present six thousand shares of capital stock, authorized and outstanding, of a par value of $100 each into six thousand shares of stock without par value under the Act of the Legislature found in General Acts of 1919, pages 698-701, and also to be authorized by the Commission to create an issue of $1,000,000 of 8 per cent cumulative preferred stock, redeemable at 107.50 per cent. The petition discloses no further information to the Commission in regard to the change of its present stock to stock without par value and with regard to the issuance of $1,000,000 of additional preferred stock than to aver that "the value of its properties is already clearly demonstrated to the Commission in the recent hearings as to rates, to which reference is made."

If the petition did not ask anything more than to be allowed to change its present six thousand shares of stock with a par value of $100 into six thousand shares of stock, without par value, there would seem to be no difficulty, and

the Commission might readily grant permission to do this under the authority of the Act of the Legislature above referred to.

Randle v. Winona Coal Company, (M.S.) decided by Supreme Court of Ala., June 23, 1921.

However, since under said Act stock without par value may be given such preferences, designations and voting powers or restrictions or qualification as are set out in the proposed amendment of the corporate charter, it would seem appropriate for the Commission to require any public utility asking permission to make such change in the nature of its stock, to give the Commission more definite information as to the preferences, rights and privileges the corporation proposed to give such stock without par value in order that the Commission might be able to determine with certainty that it is compatible with the public interest to grant the permission asked for.

General and Local Acts, Special Session 1920, pp. 38, 40.

When, however, the question is presented whether the Commission should grant permission both to change said stock of par value to stock without par value, and also to authorize an issue of $1,000,000 of 8 per cent cumulative preferred stock by the public utility, I am quqite certain the petition falls far short of furnishing to the Commission sufficient information to enable it to act intelligently and with a due regard for the public interests, even if it be assumed that the Commission has testimony before it as to the reasonable value of all assets of this Company. The Act of the Legislature which clothed this Commission with authority to pass upon the issuance of stock or bonds by a public utility prescribed that the Commission shall make an order giving such permission only in the event that it finds such issue of stock or bonds (a) is for some lawful object within the corporate purposes of the utility, (b) is compatible with the public interest, (c) is necessary or appropriate for or consistent with, the proper performance by the utility of its service to the public as such utility and will not impair its ability to perform that service and (d) is reasonably necessary and appropriate for such purpose.

Your letter raises this very material inquiry, namely: Could the preferred stock mentioned be issued as a stock dividend and as representing a supposed excess value of the properties of the company over and above the present outstanding $600,000 of capital stock, and without, of course, the company receiving anything for such additional issue of stock in money, services, or property. You have referred the Attorney General to the case of Fitzpatrick v. Dispatch Publishing Company, 83 Ala. 604.

Our Supreme Court has recently held that a corporation created under the laws of Alabama may lawfully authorize an increase of stock equal to and upon the basis of the increase in value of its properties of a permanent value over the capital stock then authorized and outstanding.

State ex rel. White v. Citizens Light & Power Company, 172 Ala. 236, 237.

Randle v. Winona Coal Company, supra.

The Fitzpatrick case is construed and explained in the case of Randle v. Winona Coal Company. The Supreme Court of the United States has said that a stock dividend is no more than a book adjustment, in essence, not a dividend, but rather the opposite.

Eisner v. Macomber, 40 Supreme Court Reporter, 189, 194.

14 Corpus Juris, 812.

In my opinion, therefore, if the property of permanent value belonging to this company exceeds the amount of the authorized and outstanding capital stock by as much as $1,000,000, then a sufficient basis of value exists to authorize the issue of $1,000,000 of stock having regard to the sole question of there being a proper and sufficient basis of value authorizing the issuance of such stock. This would certainly be true if the six thousand shares of stock without par value (representing the former six thousand shares of par value of $100) does not require under the new order a greater value of property upon which to found such six thousand shares of stock without par value than the capital which formed the basis for the six thousand shares of stock of par value of $100 each. But when the petition gives the Commission no information which will enable it to say what

amount of property of permanent value should exist upon which to base the six thousand shares of stock without par value, how can the Commission determine whether the corporation has property of a permanent value in amount sufficient to afford an adequate basis for the issuance of the stock without par value and said amount of preferred stock? The authorization of stock without par value is a new thing in the United States, although now authorized by twenty-one states. The laws authorizing such stock have been enacted within the past four or five years.

Randle v. Winona Coal Company, supra.

In view of the above considerations, the petition in this case seems to be wholly insufficient to enable the Commission to apply the tests which the statute fixes in such cases.

There are other very material considerations involved in the matter of the Commission granting permission to a public utility to issue such a large amount of 8 per cent cumulative preferred stock. The uncontrolled issuance of stocks and bonds by a public utility corporation has been found to involve the public interests to such a great extent that now the matter is regulated by laws similar to our own in practically every state in the Union. The object of these laws is primarily to prevent the inclusion in the capital of elements which would expand it beyond the proper basis for the computation of just and remunerative rates for the service rendered and thus hinder public regulation.

Fletcher Cyc. of Corp., Vol. 5, p. 5852.

A statute similar to our own has been construed to require the Commission to investigate not only the objects of the proposed bond issue, but the conditions under which it is to be made, and the entire environment of the company and the prospective opportunities it may encounter in view of its past history, to meet the financial demands that the proposed burden is likely to impose upon it.

Fletcher Cyc. Corp., Vol. 2, p. 1938.

It requires no citation of authority, of course, to show the Commission that the authorization of 8 per cent cumulative preferred stock would impose a considerable burden upon the corporation and in the case of a public utility,

upon the people, since the rates to be paid by the people must be made sufficiently high to enable the corporation to earn a reasonable net return upon its other stock and to guarantee a net return of 8 per cent every year upon such $1,000,000 of preferred stock. As I understand the word "cumulative" it means that if such preferred stock does not earn and receive an 8 per cent dividend during any one year, then the contract included in such stock certificate requires that during the succeeding year it must receive a dividend sufficient to amount to 8 per cent on the stock and to make up for the deficit of the prevous year, thereby enabling the stock in effect to receive an 8 per cent dividend for every year.

The Supreme Court of Massachusetts in construing the statutes of that State which give to a Board of Commissioners similar powers in passing upon the issuance of stock and bonds by public utility corporations, expresses its approval of this statement of the purpose of such legislation, namely, that it was "to the end that reasonable dividends, interest and profits should be paid only upon a sufficient capital to properly conduct the business of the quasi public corporation."

Fall River Gas Works Co. v. Board of Commissioners, 102 N. E. 475, 478.

The commission will also be mindful of the fact that public utility corporations often urge that the amount and value of their bonds and stock should be taken into consideration in arriving at the value of their properties when such value becomes a matter of inquiry in fixing rates. In our State there might be a presumption that there is a property value equivalent to the amount of stock issued, since our Constitution requires money, labor or property to be received for any stock issued. It has been held that the amount of stock issued by a corporation may be looked to in determining the values of its properties.

Spring Valley Water Works v. City of San Francisco, 124 Fed. 574, 596.

Very truly yours,

HUGH WHITE,

Special Assistant Attorney General.

AUTOMOBILE LICENSE:—Roadster or touring car converted into truck liable for motor truck license.

December 14, 1921.

Hon. John S. Mooring,
Chairman, State Tax Commission,
Capitol.

My Dear Sir:

You request the opinion of the Attorney General upon the question whether or not an automobile roadster or touring car if converted into a motor truck will be liable for the license required by law for motor trucks. With your request you attach letter of Mr. O. S. Finch, license inspector of Jefferson County, of the 9th instant, which raises this question.

It is plain, I think, that the license tax charged on automobiles and motor cars under the act approved September 15, 1919, is based in a large measure upon the use for which the automobile or motor car is adapted, and to which it is put.

Schedule 6 of Section 361 of the Act fixes a license tax on automobiles and motor cars *kept for private use.*

Schedule 7 of said Section 361 fixes a license tax upon motor trucks upon the basis of their drawing or carrying capacity.

Schedule 8 of said Section 361 fixes a license tax upon automobiles or motor cars *used for transportation of passengers.*

Schedule 9 of said Section 361 requires the automobile licensee to state in his application for license whether he proposes *to use* his automobile *for private use* or *for commercial purposes.*

General Acts 1919, pp. 397, 398, 399.

The use made of the street and highways by such vehicles and the special benefit resulting therefrom to the users of such vehicles is recognized as furnishing a just and proper basis for a license tax, and our Supreme Court has said that such tax is more equitable when graduated with respect to the character of the vehicle.

Brown v. City of Mobile, 122 Ala. 159-168.

It is a matter of common knowledge that the chassis of many automobiles is strong enough and is adapted for carrying either a body made for private or family use, or a body made for transporting freight, merchandise, or other heavy articles. Manifestly it would be defeating the plain purpose of the law for any person to take out a license to operate an automobile for private use and then convert the same into a motor truck and fail or refuse to make payment of the license required to be paid for motor trucks. The license tax for a motor truck is higher than that for an automobile kept for private use, and it is plain that this Act of the Legislature recognizes that it is just that a motor truck should pay a higher license because its use is more detrimental to the highways and perhaps because a motor truck is generally used in business for profit.

When a roadster or touring car has been converted into a truck is a question of fact which would have to be determined in each particular case. The word motor truck as found in the license schedule is to be taken in its ordinary and popular sense, I think, because there is nothing in the context to indicate that the words were used in this section in a different sense.

> Crook v. Commissioner's Court of Calhoun County, 144 Ala. 505, 506.

Standard Dictionary defines a truck as being "a strong vehicle variously constructed, especially one with four wheels, for transporting freight, merchandise and other heavy articles." The context of the Act of the Legislature indicates that the word truck as used in this license schedule was used in this sense and with this meaning.

Yours very truly,

HUGH WHITE,
Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Act releasing officers from liability for moneys paid out under void acts is unconstitutional.

December 14, 1921.

Hon. Chas E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

Your letter of November 16th raises the question of the constitutionality of Act No. 36, passed at the Special Session, 1921, entitled, "An Act to protect state and county officials and other persons against suits to recover money paid out under statutes subsequently held to be unconstitutional or void." (Acts 1921, page 50.)

The Act attempts to relieve state and county officers and other persons from all liability for moneys received or paid out under a statute subsequently declared unconstitutional by the courts of the State.

This Act might more appropriately be entitled "An Act to suspend the Constitution of Alabama."

Section 100 of our Constitution provides:

> "No obligation or liability of any person, association, or corporation, held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; provided, that this section shall not prevent the legislature from providing by general law for the compromise of doubtful claims."

This constitutional provision is so plain and emphatic in its terms that "he who runs may read."

Legislative attempts to circumvent the Constitution are usually camouflaged under deceptive coverings. The population classification Acts are the most familiar illustrations of this legislative practice. The Act in question, however, has at least the merit of unblushing boldness and demonstrates a new kind of legislative courage. It is a frontal attack—not a flank movement; a direct, defiant denial of

any constitutional limitations on the legislature's power to appropriate public money or to cancel obligations owing to the state, or any of its political subdivisions.

The Act in question assumes: (1) an unconstitutional statute; (2) the illegal receipt and expenditure of public moneys under such statute; (3) the resultant liability to the state, county, or municipality of officers and other persons for such illegal receipt and expenditure of public moneys; and (4) a decree of a court declaring the statute unconstitutional. Based on these four admitted premises, the statute seeks to avoid the consequences of the original wrong. Public moneys may be misappropriated and converted, under a law declared to be unconstitutional and void, but the Act in question, admitting the wrong, denies the right to recover the money. Courts may make academic announcements of constitutional infringments, but they are powerless to right the wrong or prevent further infractions of the fundamental law. The Act in question serves as a perpetual stay of execution on judgments rendered by our courts. If this statute stands, the passage of unconstitutional laws, permitting the misappropriation of public funds, may prove a popular legislative pastime. The statute *authorizing* the illegal expenditure may be solemnly stricken down by the decree of a court, but the *expenditure* itself is *automatically approved* by the Act in question. The writer can conceive of no law which could conflict more directly with the letter and spirit of Section 100 of our Constitution. This section operates directly upon the legislature and was intended expressly to prohibit the *very thing* which the legislature now attempts to do. It appears from the very Act itself that the state, counties and municipalities *now own* and hold undisputed claims against certain officers and individuals, which can be collected by suit. The Constitution says that "no obligation or liability of any person * * * held or owned by the State, or by any county or other municipality thereof, *shall ever be remitted, released, or postponed, or in any way diminished* by the legislature." Can any one doubt that the sole purpose of this Act is to remit, release and forever discharge obligations *now owned* by the State and its political subdivisions? Doesn't it also release *in advance*

any like future obligations which may be owned by the State and counties? It is immaterial whether the Act is construed as retroactive or prospective only in its operation. In either event, its only purpose and effect is to release and discharge obligations owned by the State, counties and municipalities. In my opinion, it is flagrantly violative of Section 100 of the Constitution. It is alsolutely null and void.

The opinion, of Judge de Graffenreid in *Mobile County* v. *Williams*, 180 Ala. 639, 61 So. 963, frequently cited since with approval, is the strongest and ablest pronouncement of our Supreme Court in support of the conclusion reached by me. In a later case, Judge Sayre, in discussing this particular provision of our constitution, says: "The inhibition of the Constitution operates directly upon county and municipal officers, as well as upon the legislature, and it was never intended that so wholesome a rule should be avoided by so simple a device." New Farley National Bank v. Montgomery County, 84 South. 815. Judge Savre's statement is approvingly quoted by Judge Thomas in Weakley v. Henry, 86 South. 48. See also: City of Demopolis v. Marengo County, 70 South. 275.

As the Act in question admits of no construction not in conflict with section 100 of the Constitution, it is void. "A void thing is no thing. It has no legal effect whatever, and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed."

Very truly yours,

HENRY P. WHITE.
Assistant Attorney General

REGISTRATION OF ELECTORS:—(1) Compensation allowed registrars only for days of session for registering electors. (2) When Commissioners' Court orders books opened for ten days, registrars can receive compensation for no more than ten days. (3) Registrars required to make no lists other than those prescribed by law. (4) Ten-day session at county seat is included in forty days allowed for registration.

Hon. H. F. Lee, December 17, 1921.
State Auditor,
Capitol.

Dear Sir:

The Attorney General has received your request for his opinion upon the following questions arising under the Act approved October 2, 1920, which provides for the registration of electors, namely:

(a) Are the registrars entitled to the per diem compensation named in section 4 of said Act for the time during which they are employed under section 35½ of the Act in making a copy of the list of names of registrars, etc.?

(b) If where the Court of County Commissioners or Board of Revenue, under section 7 of said Act, makes an order requiring the books of registration to be opened for ten working days, the registrars sit for more than ten days, are they entitled to the per diem compensation for each day that they sit in excess of the said ten days?

(c) Has the county, or its officials, any authority to require the registrars to make any list or books of the registered electors except those required under section 35½ and under section 27?

(d) Does section 6 of said Act (General and Local Acts of the Special Session 1920, pp. 124-134), provide for an allowance of 40 days in which the registrars shall visit the several precincts of the county to register voters and a 10-days additional period in which to register voters at the courthouse, or must the entire registration for the county be completed within 40 working days, except in counties having more than 150,000 population?

In reply I beg to advise you as follows:

Section 4 of said Act is as follows:

> "Section 4. Fees, Compensation of Registrars.—Each registrar shall receive seven dollars and fifty

cents per day, to be paid by the State and disbursed by the several judges of probate, for each day's attendance upon the sessions of the board."

A reasonable construction of said section 4, taken in connection with the other provisions of the Act, leads to the conclusion, in my opinion, that it was not the intention of the legislature to provide such compensation to the registrars for such time as might be used by them in making a copy of the list of names registered, stating the residence, county and precinct of the persons registered by precinct or by wards, if in an incorporated city or town, which copy they are required under section 35½ of the Act to make and return along with the registered list to the office of the judge of probate of the county. In my opinion, said section 35½ simply fixed the time within which they must make a return and report of their work and prescribes the form in which such return and report shall be made, and I do not think that they are to be deemed in session during such time within the meaning of that term as need in said section 4. In my opinion, the term "sessions of the board," as used in said section 4, applies to the sessions provided to be held by the board under section 6, section 7, section 23 and section 25, when a session is necessary to be held under said section 25. I do not include sections 31 and 32 because the provisions of those two sections apply to a temporary situation which is past.

In answer to the second question (b) above set out, it is my opinion that the Act limits the time during which the court of county commissioners or board of revenue may require the books of registration to be opened under said section 7 to ten working days, and they have no authority to require the books to be opened for a greater time than such ten working days, and if the registrars sit for a greater period than ten days, they are not entitled to per diem compensation for any time in excess of such ten working days.

In answer to the third question (c) above set out it is my opinion that no county, nor any of its officials, have any authority to require the registrars to make any list or books of registered electors in addition to those lists and books which the registrars are required to make under sec-

tion 27 and under section 35½. I find no authority in the Act giving the county officials power to require the registrars to make any other lists or books. Of course the list and books to be made by the registrars under sections 27 and 35½ are required by the Act itself.

In answer to the fourth question set out above (d), it is my opinion that the registrars are required to complete the registration within 40 days and that the 10-day period during which they are required to sit at the courthouse under said section 6, must be taken as a part of said 40-day period. In other words, the entire time to be used by the registrars in visiting the several precincts of the county and in holding the ten days session at the courthouse, all taken together, must not exceed forty working days. In the case of counties having more than 150,000 population the entire time to be used for said purposes must not exceed 75 working days. I think the language of said section 6 when given a reasonable construction shows that this was the intention of the legislature. This is further confirmed when a comparison of said section 6 is made with section 15 of the 1915 Act, for which said section 6 is a substitute. Acts of 1915, page 244.

Very truly yours,
HUGH WHITE,
Special Assistant Attorney General.

JUVENILE COURT OF MOBILE COUNTY:—Has no jurisdiction to try parents or guardians for violation of compulsory school attendance law.

December 20, 1921.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Montgomery, Alabama.

My Dear Madam:

You request an opinion as to whether or not the juvenile court of Mobile County has jurisdiction to try parents or guardians for failure to keep their children in school as provided by the compulsory educational law of this state.

The juvenile court is a creature of the Legislature; its powers are entirely derived from the statutes, and unless

authority for the exercise of its jurisdiction can be found in some specific enactment such jurisdiction does not exist.

The statute prescribing compulsory school attendance upon certain children in the state of Alabama is to be found in article 15 of the last school code (Acts 1919 page 615ff). By section 9 (page 617) it is provided as follows:

> "It shall be unlawful for any parent, guardian, or other person having control of a child to fail to send such child to school as provided by the provisions of this article, and any parent, guardian, or other person violating the provisions of this article shall be guilty of a misdemeanor and shall be fined in a sum of not less than five dollars nor more than fifty dollars, and may be committed to the county jail for a term of not to exceed thirty days."

Section 8 provides in part as follows:

> "The attendance officer shall make complaint in the name of the State of Alabama against any parent, guardian, or other person, having control of such child in a court of *competent jurisdiction* which court shall hear and try all complaints, impose fines, enforce collection by imprisonment if necessary, and fully execute the provisions of this article."

It thus appears that the failure to send to school a child of proper age who is not exempt is a misdemeanor punishable "in a court of competent jurisdiction." The juvenile court is not specifically mentioned except in section 4 (page 616) where it is given jurisdiction in another matter, and in the absence of such specific authority it has no jurisdiction under the principles above alluded to. The courts of jurisdiction competent to try misdemeanors in Mobile County are the recorder's court, court of common pleas, and the circuit court.

I am of the opinion, therefore, and so advise, that the juvenile court of Mobile county has no jurisdiction to try parents or guardians who fail to send children to school in compliance with the compulsory attendance law.

MARION RUSHTON,
Assistant Attorney General.

CONVICT FUND:—Where local law allows State witnesses more than 75 cents a day, the Convict Department can pay only the 75 cents allowed by the Code. Convict Department may require clerk to list names of witnesses subpoenaed. No fee for serving subpoena on sheriff.

December 20, 1921.

Hon. William F. Feagin,
State Warden General,
Capitol.

My Dear Sir:

The Honorable J. M. Thomas, Clerk of the Circuit Court of Conecuh County, has referred to this office your ruling of November 26, 1921, upon certain questions arising as to cost bills in criminal cases where the defendant has been sentenced to the penitentiary.

The first question arises under the local act for Conecuh County passed by the last Legislature, Special Session 1921, which provides that witness fees in criminal cases shall be paid at the rate of two dollars per day. It is insisted that this local act affects Section 6572 of the Code and that the Convict Department should now pay witness fees from Conecuh County at the rate of two dollars per day rather than at the rate of seventy-five cents, as prescribed by the Code section above referred to. This of course is a misapprehension. The Convict Department is responsible only for the items and the rates set out in the schedule provided by section 6572. The payment of any costs by the state is a mere boon granted by the Legislature and until Section 6572 is amended its terms control as now written.

The second question raises the question as to what is a sufficient itemization of a cost bill under the provision of Section 612 of the Code which reads as follows:

> "All accounts against the state must be accurately and fully itemized, and accompanied by the affidavit of the person stating the correctness of same and that no portion of such account has been paid."

In the form provided by your department for the presentation of the cost bill, there is a space for recording the names of state witnesses who claim fees for their attendance either before the grand jury or the circuit court. It sometimes happens that a clerk issues a subpoena for a

state witness and the witness, though properly summoned does not "prove up" his fee. The question which arises is whether or not the names of witnesses who do not "prove up" their fees must be shown so that your department may be sure that the proper number of subpoenas have been issued. In other words does the phrase "accurately and fully itemized" require the clerk to set out the name of the persons to whom he has issued subpoenas? I am of the opinion that the duty imposed upon the State Warden General to examine and certify the correctness of the claims under Section 6572 carries with it a duty upon the part of the clerk submitting such a claim to itemize his claim so that the Warden General may make an intelligent examination. It therefore seems to me, that should the Warden General require the names of the persons to whom subpoenas as state witnesses were issued and served, such a requirement is within the meaning of the statute. However, there is no place for such an itemization upon the form now provided by your department, because the space above referred to is expressly headed "*fees* of state witnesesses," and is not appropriate for the names of state witnesses who have not proved their fees. I suggest that an addendum to the present form containing an appropriate blank for such information would greatly assist both the clerks of the courts and your department in a proper performance of the duties imposed upon each of you.

The third question is as follows: Must the Convict Department pay for the service of a subpoena upon the sheriff for his attendance before the criminal court held in the county of which he is an officer? I am of the opinion that under Section 5870 of the Code it is the duty of the sheriff to attend such court and the service of a subpoena upon him for that purpose is *functus officio*. Such a useless procedure ought not to be indulged in, and the Convict Department ought not to pay for it.

Very truly yours,

MARION RUSHTON,
Assistant Attorney General.

CORPORATION FRANCHISE TAX:—Cannot be collected for use of counties from 1911 to 1919 unless levied by County Commissioners' Court.

December 22, 1921.

Hon. John S. Mooring,
Chairman, State Tax Commission,
Capitol.

Dear Sir:

Your request of 16th instant for the opinion of the Attorney General has been received. Your request is to be advised upon the following questions:

1. Does the levy for the use of each county in the State of 50% of the State license or privilege tax made under section 2 of the license Act of 1915 (General Acts 1915, pages 489, 527) have the effect to levy for the use of each such county a franchise tax for the use of the county, which franchise tax it is provided may be levied by the courts of county commissioners, or other courts of like jurisdiction, under subsection 7 of section 16 (General Acts of 1915, pages 397-399)?

2. If the question numbered (1) above set out is answered in the negative by the Attorney General, you desire to be advised whether any franchise tax can be collected for the counties of the State for the years 1911 to 1919, inclusive, unless the Courts of County Commissioners or Boards of Revenue have specifically levied such franchise tax.

It is true, as stated in your letter, that our Supreme Court and other courts of high standing, and a number of the leading text writers upon subjects involving a determination of the nature and characteristics of franchise taxes, have held that a franchise tax is a license tax for the continued exercise of corporate franchises. This is shown in the very able and exhaustive opinion of the Honorable Henry P. White, former Assistant Attorney General, bearing date April 30, 1921, rendered to your Department. I refer you to that opinion and to the authorities there cited.

While the above is true generally and while the term license tax has been used both by the legislature and by our Supreme Court in many instances as being correctly applicable to, and as applying in fact to franchise taxes, yet it has been recognized that there is a distinction between

the two, and in the case of the Acts of 1915, it has been held that in the license Act (General Acts of 1915, pages 489, etc.) the legislature recognized a distinction between the license tax and the franchise tax provided for in Acts 1915, pages 397-399, as a part of the Act which provided for ad valorem taxes (General Acts of 1915, pages 386, etc.)

Williams, Probate Judge vs. State ex rel. Mobile L. & R. R. Co., 195 Alabama 118.

A careful examination of said license Act of 1915 shows that it was enacted to provide taxes or revenue by requiring a certain license fee for engaging in or carrying on the several occupations or businesses therein named, and has no reference to any tax of the nature of a franchise tax. It is my opinion that said section 2 of such license Act does not refer to and cannot reasonably be construed to cover or include franchise taxes provided for in pages 397-399 of the Act of 1915. Further basis for this opinion is found in the fact that the Act which provides for the State franchise tax leaves the question as to whether any franchise tax shall be levied for the use of the county to the discretion of the courts of county commissioners (Acts of 1915, page 399) and simply confers authority upon such courts to levy a county franchise tax for county purposes as in their judgment may be necessary, whereas in the case of license taxes for the privilege of carrying on business, the legislature saw fit to levy in the license Act itself such a tax of 50% of the State license tax, for the use of each county. Therefore there is, in my opinion, even stronger reason here to hold that said section 2 of the license Act of 1915 was not intended to be applicable to the 1915 franchise tax than there was for the holding by the Supreme Court in the Williams case, supra, that section 18 of the license Act was not intended to refer to the franchise tax of 1915.

In answer to question numbered (2), above set out, it is my opinion that a franchise tax for the use of the counties of the State for the years 1911 to 1919 cannot be collected unless the court of county commissioners or board of revenue have levied such tax.

The Act of 1911 providing for franchise taxes did not itself levy a franchise tax for the use of the counties, but

like the Act of 1915, in this regard, gave authority to the court of county commissioners or other courts of like jurisdiction to levy a franchise tax, not exceeding 50% of the State franchise taxes, for county purposes, as in its judgment might be necessary.

General Acts of 1911, page 184, section 33F.

In legal effect the provisions of the Act of 1911 and of the Act of 1915 are the same with respect to it being necessary under each Act for the court of county commissioners or board of revenue to levy the franchise tax.

General Acts of 1915, page 399.

In my opinion, therefore, it was necessary under both the Act of 1911 and the Act of 1915 for such levy to be made before the county could collect franchise taxes for its use. If the counties failed through their courts of county commissioners or boards of revenue to levy such franchise taxes, it is my opinion that they cannot now levy same. Authority to levy such franchise taxes by such counties could not exist, in my opinion, without authority of statute and I have not been able to find any authority for such courts or boards to levy such franchise taxes which have escaped during previous years. This has been expressly decided where the principle involved was the authority of the court of county commissioners to levy taxes on tangible property which had escaped them during previous years. I cannot see any difference in principle between franchise taxes and taxes on tangible property with respect to this proposition.

Perry County et als. vs. R. R. Co., et als, 58 Ala. 546.

The question whether the court of county commissioners or the board of revenue has made a levy which covers such franchise taxes is a question of fact to be determined in each county. And whether they have levied such franchise tax will probably in many instances depend upon a construction of the language used. In this connection I beg to call your special attention to the fact that the very legislature which originated the franchise tax as we now have it, and as we have had it since the year 1911, not only treated it as a license tax, but called it by that name.

See Special Acts of 1911, pages 184, 185.

This fact together with the fact that our Supreme Court and other courts and text writers have not only held that a franchise tax is a license tax but in referring to it they call it a license tax, furnishes very strong reason for holding in the case of any county that, if it has made a levy of license tax in the amount of 50% or less of the tax levied by the State for licenses, it was the intention of the court of county commissioners or board of revenue to levy such franchise tax, and that such a levy would in fact and in law constitute a levy of the franchise tax as well as the license tax and would enable the county to recover such franchise tax for its use.

Very truly yours,
HUGH WHITE,
Special Assistant Attorney General.

COSTS:—Payment of witnesses' and officers' fees in case of insolvent county convict unable to perform hard labor.

December 29, 1921.

Hon. Chas. E. McCall,
Chief Examiner of Public Accounts,
Capitol.

My Dear Sir:

You state that Calhoun County has a contract for the hire of its convicts by which the hirer pays nothing for female convicts, merely agreeing to maintain them. A woman convicted of a misdemeanor in that county being unable to pay the costs of her conviction was sentenced to hard labor therefor and has served the term imposed. Nothing has been received for her labor and the state witnesses, clerk, sheriff and other officers have not been paid the fees allowed them for their services. Execution for the costs has not heretofore been issued, and it is asserted that, the convict having "worked out" the sentence given her "in lieu of costs," none can now be issued, and hence no valid claim against the fine and forfeiture fund can be made under Sections 6660 and 6666 (for the witness fees) and 6889 (for the officers) of the present Code.

The appropriate provisions of these sections are as follows:

"6660—The fees of witnesses subpoenaed on the part of the state to appear * * * before any court in which criminal prosecution is pending must be taxed against the defendant if he is convicted * * * but if * * * the costs are imposed on * * * the defendant * * * *and an execution against him for the same is returned 'no property found'* * * * such fees must be paid by the county in the manner specified in Section 6666."

"6666—It is the duty of the clerk of the court to issue a certificate to each witness appearing on the part of the state, stating therein the amount of compensation to which he is entitled, the facts which, under the provisions of Section 6660 make it a good claim against the county, which certificate is receivable in payment of any debt due to the country for fines and forfeitures and payable by the treasurer out of any fines and forfeitures in the county treasury.'

"6889—Whenever there shall be a surplus of the fund arising from fines and forfeitures in the county treasury of any county over and above the sum required to pay the registered claims of state witnesses, the county treasurer of such county must pay the fees of the officers of court arising from criminal cases * * * in which defendants have been convicted and *have been proved insolvent by the return of executions 'no property found'* * * * unless the payment or distribution of such funds are otherwise provided for."

You inquire whether under the circumstances above outlined an execution may issue against the convict for the costs which if returned 'no property found' may serve as one of the steps necessary to charge the fine and forfeiture fund.

This question seems to be one of original impression and I have been unable to find any authority directly in point. The case of Mims v. State ex rel Stallworth, 180 Ala. 511, does not discuss the point and the case of Grey, Treasurer, v. Abbott, 130 Ala. 322, cited therein deals with a very different question which arises under Section 6572 as to state convicts.

The answer herewith submitted you rests upon inferences from rather than the decision of certain adjudicated cases.

For these reasons, I have set out my conclusions rather elaborately, but not I trust at greater length than the practical importance of the inquiry warrants.

When a defendant is convicted in a misdemeanor or "county" case, the "costs of conviction" are met in five ways:

(1) By cash payment, Section 7634;

(2) By confession of judgment with sufficient sureties, Section 7632;

(3) By execution on the defendant's property, Sections 7633 and 6632;

(4) By hard labor for the county if not presently paid, Sections 7635, 6584;

(5) From the fine and forfeiture fund of the county in certain cases, Sections 6889, 6836.

The first two of these methods are rights or privileges of the defendant. The next two are methods of compulsion which upon the defendant's failure to pay or confess judgment may be set in motion by the state or the officers or witnesses concerned and the last is a boon or bounty granted by the Legislature to the officers or witnesses when the four other methods fail. It thus appears that these methods are in effect alternatives conditional upon one another and as might be expected, the time for choosing the alternative method of payment to be followed and many incidental requirements also are prescribed by law.

The costs must be paid or secured "presently" else an additional sentence therefor will be imposed under Section 7635. It has been held that a judgment for costs may not be changed into a sentence to time after the end of the term during which the conviction was had.

Acts 1915, page 707.
Ex parte State 94 Ala. 431.

It is safe to suppose therefore that "presently" means within thirty days at most.

Executon for the costs "or any portion thereof remaining unpaid" may issue according to Section 7635 "as in civil cases"; that is, not earlier than ten days from the end of the term (Section 4080-4081 as amended, Acts 1915, page 270) and not later (except upon a reviver) than ten years from the date of judgment. (Section 4095.)

Hard labor to pay the costs must be imposed before the end of the term at which final sentence of conviction was had (Acts 1915, page 707, *ex parte* State, supra) by and until the defendant has failed presently to pay them. (Section 7635). The term of hard labor for costs cannot exceed ten months although the sum derived from the convict's labor at the statutory rates may not have equaled the sum due for costs. It is also provided that upon payment of the costs or any balance due thereon by the hire of the convict or otherwise, he must be discharged from the sentence therefor and the machinery for such discharge is provided.

Payment out of the fine and forfeiture fund is conditioned upon the return of an execution against the defendant "no property found." Such a return cannot be made by the sheriff in less than thirty days. (Section 6632). Execution can only be issued, of course, in pursuance of a valid unpaid judgment.

Hendon v. Delvichio, 137 Ala. 594.

Stated in different terms the present inquiry is this: Does the serving out of the term of hard labor imposed for costs (method No. 4 above), no matter how much or how little is paid therefor by the hirer of the convict, constitute such a payment or satisfaction of the costs that execution cannot be issued (method No. 3), and hence the fine and forfeiture fund cannot be charged (method No. 5)?

I beg to advise you as follows:

(A) The time actually served by the convict under a sentence for costs is an extinguishment *pro tanto* of the liability for costs and execution will not issue for the costs or any part of them paid by actual service.

In re Pierce, 89 Ala., 177.

(B) A convict is entitled at least to a credit of seventy-five cents per day for each day actually served at hard labor and if a higher rate of pay is actually received under the contract of hire, the convict is entitled to the benefit of the higher rate.

Bibb County v. Ward, 163 Ala., 473.

(C) Execution will issue for the remainder of the costs not actually served out, and this is true although the convict has served the maximum sentence for costs (ten months).

In re Pierce, 89 Ala., 177.
Clark v. State, 2 Alabama Appeals, 196.

Before the enactment of statutes permitting convicted defendants to work out the costs for which they were imprisoned, imprisonment for costs was regarded as a threat or club to be held over the convict, not as a means of permitting or assisting him to pay off his indebtedness. The club might be removed and the obligation to pay still remained. In the early case of State v. Richardson, 18 Ala. 109, the defendant was convicted and fined one thousand dollars and sentenced to imprisonment in the county jail until the fine and costs were paid. After serving for sometime,—

> "He was pardoned by the Governor from further imprisonment, but the pardon did not mention the fine. After he was discharged from imprisonment several write of *fieri facias* were issued against his property and at the following term (1849) he moved the court to quash the writs of execution and enter satisfaction of the fine and costs on the ground that the discharge from the imprisonment operated in law as a discharge of the fine. The motion was granted and the cause is brought here by writ of error at the instance of the State.
>
> "The principle is perfectly settled, that in a civil suit between individuals, if the defendant be in custody under a *capias ad satisfaciendum,* and is discharged therefrom, with the consent or by the act of the plaintiff, the judgment itself is discharged, and consequently no process can ever after be legally issued thereon, either against the goods or the person of the defendant. Cooper v. Bigelow, 1 Cow. 56; Little v. The Newberry Bank, 14 Mass. 443; Vigers v. Aldrich, 4 Burr. 2482. The reason why the discharge of the defendant from the arrest discharges the judgment, is this, that when once the defendant is in execution the judgment is satisfied, and if the defendant be released by the consent of the plaintiff, he cannot be again taken in execution,

for the debt, in law, is extinguished. Tanner v. Hague, 7 D. & E. 247; Vigers x. Aldrich, 4 Burr, supra * * * But is this rule of the common law applicable to the case before us? The debt is due to the State, being a fine imposed for the commission of a high misdemeanor. We think it perfectly well settled at the common law, that although one be in custody under the judgment of imprisonment until a fine for a misdemeanor be paid, still the King may have process of execution against the goods and chattels, lands and tenements, of the defendant, and if he be not in custody, a *capias pro fine* may issue against his person, and execution against his goods also, or a writ may issue against his body, goods and chattels, lands and tenements. Rex. v. Woolfe, 1 Chitty's R. 401; Rex. v. Wade, Skin. R. 12; 2 Barn & Ald, 609.

"The difference then between a private judgment and one for a fine due to the King is this: the imprisonment of the defendant under a private judgment is in law a satisfaction of it, but the imprisonment of the defendant for the non-payment of a fine is no satisfaction thereof, and execution may issue against his goods, notwithstanding his imprisonment; and as the imprisonment for the non-payment of a fine is not a satisfaction of the judgment, we think it entirely clear that this imprisonment may be released without discharging the debt. This would be the case in regard to private judgment, if the arrest and imprisonment of the defendant did not work a satisfaction of the judgment. Under this view, we think the court erred in quashing the execution and ordering the judgment to be satisfied, for it is certain that it was not the intention of the Executive to release the fine, but the imprisonment alone. Let the judgment be reversed and the cause remanded."

Under the old law the proceeds of the labor of convicts sentenced for costs was paid into the county fine and forfeiture fund and not to the witnesses or officers.

State *ex rel*, etc., v. Coleman, 73 Ala. 550.

However public-spirited the state's witnesses and officers may have been, it was hardly fair to regard their fees as

paid by hard labor of which the county received the proceeds. Such officers and witnesses were therefore permitted to levy an execution thereof, although costs had been paid to the county by hard labor.

Under the present law imprisonment for costs is not regarded as a club, but as a means of payment. The language of the statute is:

> "The court may impose additional hard labor for such period not to exceed ten months *as may be sufficient to pay the costs at the rate of seventy-five cents per day.*"

Also the convict must be discharged from such imprisonment upon the *payment thereof by the hirer of such convict,* or otherwise. And Section 6584 is to the same effect:

> "Whenever any convict is sentenced by the court and required to do hard labor for the county, an additional sentence not to exceed ten months in any case for the *payment of costs of conviction may be imposed;* and the court must determine the time required *to work out such costs at the rate of seventy-five cents per day.* The costs of conviction of county convicts shall be the same as in case of state convicts."
>
> Section 6584.

Moreover by Section 6600 of the present Code the proceeds of the hire of a convict so far as the sentence is for costs are paid to the clerk of the court for distribution to the officers and witnesses and not into the fine and forfeiture fund. While some sections of Chapter 191 of the Code of 1907, of which this section is a part, were changed by the Act of Special Session of 1907, regulating county convicts, the subject matter of this section was not touched upon and upon familiar principles, it is not to be regarded as repealed by implication.

25 R. C. L. 918.

There being a possibility that the proceeds of any of the hard labor of the convict will be paid to those entitled to receive them, it is not very startling to arrive at the conclusion that the Legislature intended that hard labor for

costs under Section 7635 extinguishes the liability for such costs at the statutory rate when, as, and if, served.

This conclusion is supported by the language of Chief Justice Stone in construing Section 4504 of the Code of 1886, which corresponds except as to rate and maximum sentence with Section 7635 of the present Code.

> "The amendment of Section 4731 of the Code of 1876, approved February 26, 1881 (Sess. Acts, 37), declared a limit on the term for which a convicted offender can be sentenced to hard labor for non-payment of costs. Code of 1886, Sec. 4504. Before that time, the only limit was the amount of costs adjudged, at the rate the statute permitted the presiding judge to fix as the per diem allowance. The amended statute fixed the limit of the sentence for costs, in convictions of misdemeanor, at eight months, and not less than thirty cents per diem for each day. Under the statute, if the labor of the convict, at the rate per day fixed by the presiding judge, pays the whole adjudged costs in less than eight months, whenever the payment is completed, the prisoner is entitled to his discharge. On the other hand, if at the rate fixed it requires more than eight months to make such payment in full, then the term of the imprisonment on that account cannot be extended beyond that term. This is a mere boon extended to convicted offenders, by shortening the term of the alternate mode of collection. It is not a release of the residue of the costs.
>
> "The amount of the costs adjudged in this case was $172.75, whereas the wages of the prisoner for eight months, at thirty cents, would amount to only seventy-two dollars. His right to be discharged from the sentence against him for costs depends, not on the payment of the balance of $72.00, as claimed by him, but on the payment of the balance of $172.75, the costs adjudged against him.
>
> "Upon payments of the costs—the whole adjudged costs, less *the part paid in labor*—the defendant will be entitled to his discharge, but not till then."

It being determined that the time served by the convict at hard labor for costs operates as an *extinguishment pro*

tanto of the liability therefor, it becomes necessary to determine whether the contract rate at which the convict is hired, or the statutory rate governs the amount of earnings so to be credited. The language of the statute is:

> "At the rate of seventy-five cents per day and the court must determine the time required to work out such costs at that rate."

Certainly no lower rate per day could be legally imposed.

> Brown v. State, 115 Ala., 74.
> Dowling v. City of Troy, 173 Ala., 468.

Yet it has been determined that where the contract rate is higher than the statutory rate the convict is entitled to the benefit thereof.

> Bibb County v. Ward, 163 Ala., 473.

It is only the hard labor actually performed by the convict which lessens his liability for costs; if while he is serving a sentence for costs it is discovered that he is the owner of property, execution may be levied upon that property for the balance of the costs not yet worked out. Further if the convict is discharged at the end of ten months (the statutory limit of imprisonment for costs), execution may be levied for any balance then due remaining unpaid. This conclusion results from the language of In re Pierce, 89 Alabama, 177, above quoted and from Clark v. State, 56 Ala. App., 196, where the court said:

> "It is insisted that the court was in error in sentencing the defendant to hard labor for the payment of the sheriff's removal bill. The ground of the objection to that part of the sentence is that the statute (Code 1907, Section 6638, last clause) which authorizes the taxation of that item of cost, provides only for the use of execution against the defendant therefor; and it is insisted that there is no authority of law for including that item in the amount which is made the basis of the court's determination of the period of hard labor required to work out the costs, when the defendant fails to pay them or to confess judgment therefor. In other words, the contention is that the effect of the provision

above mentioned is to make execution against the defendant the exclusive method of enforcing the collection of the sheriff's removal fee and expenses. This contention cannot be sustained. Section 6638 of the Code, in which that provision is found, prescribes the fees and allowances to which the sheriff is entitled in criminal cases, and does not deal with the question of sentencing the defendant to hard labor to pay the costs of the prosecution. Sections 6584 and 7635 of the Code contain the applicable provisions of the law on that subject. By the express terms of the last-mentioned section, 'if the costs are not presently paid or judgment confessed therefor, as provided by law, then the court may impose additional hard labor for the county for such period not to exceed ten months, as may be sufficient to pay the costs, at the rate,' etc. In such a case as the present one, the amount due to the sheriff for the removal of the defendant is as much a part of 'the costs' as any other item mentioned in Section 6638 of the Code. If the provision for issuance of an execution, contained in the last clause of that section, could be construed as having the effect of making an execution against the defendant the exclusive method of enforcing the collection of that item of costs, it would follow that nothing but an execution could be resorted to for the collection of any of the costs of the prosecution in such a case, as the execution there provided for is not merely for the removal fees and expenses, but also 'for the other costs.' Plainly such a construction is not permissible, as the result would be to prevent obedience to the explicit requirements of Sections 6584 and 7635 of the Code."

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

BOARD OF CONTROL AND ECONOMY:—Contracts for stationery, printing, etc., to be approved by State Treasurer and State Auditor.

December 31, 1921.

Hon. H. F. Lee,
State Auditor,
Capitol.

My Dear Sir:

You have requested an opinion as to whether or not any contracts made on behalf of the State of Alabama or any of the departments or institutions thereof, through the agency of the State Board of Control and Economy, should be submitted to you and passed upon by the State Auditor and State Treasurer except those specifically named in Section 69 of the Constitution of Alabama.

By Section 69 of the Constitution of Alabama, the State Auditor and State Treasurer must approve all contracts for

> "All stationery, printing, paper, and fuel used in the legislative or other departments of the government * * * and the printing, binding and distribution of laws, journals, department reports and all other printing, binding, and repairing and furnishing of the halls and rooms used for the meeting of the Legislature and its committees."

This section of the Constitution is self-enacting and includes every kind of contract which has been placed under the supervisory control of the Auditor and Treasurer by the statutes dealing with the Board of Control and Economy.

See Acts 1919 page 553 (as to the reports of the Court of Appeals and Supreme Court) and page 1120 (as to other printing).

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

PRISONERS:—County may pay for medical services to prisoners wounded during capture, authorized by sheriff.

January 6, 1922.

Hon. Frank E. Poole,
Solicitor, First Judicial Circuit,
Grove Hill, Alabama.

My Dear Sir:

The Attorney General has referred to me for answer your inquiry dated January 2nd which involves the question of the liability *vel non* of a county for the medical and hospital expenses of a prisoner wounded by the sheriff of the county in making his arrest. The county is not responsible for medical services rendered at the request of the sheriff except by statute. Mitchell v. Tallapoosa County, 30 Ala. 130. Such liability is the creature of the statute and express authorization must be found in some statutory provision. In the Code of 1907 there are two provisions governing such cases. Section 1611 permits the probate judge under certain circumstances to authorize medical services and to bind the county to pay for them, and Section 7198 provides as follows:

> "Necessary clothing and bedding must be furnished by the sheriff or jailer, at the expense of the county, to those prisoners who are unable to provide them for themselves; and also necessary medicines and medical attention to those who are sick, when they are unable to provide them for themselves."

Both of these sections have long been a part of the Code of Alabama. The predecessor of Section 7198 has been interpreted by our Supreme Court in the case of Malone v. Escambia County, 116 Ala. 214. The facts of that case seem to parallel very closely the facts of the case you submit. It being alleged in the complaint that

> "During the month of September, 1895, James McMillan, Sheriff, of Escambia County, with lawful warrant of arrest (in the instant case I understand there was no warrant, but the offense was committed in the presence of the sheriff) did arrest or endeavor to arrest or take into custody one Tom Dower, who then and

> there resisted said arrest and was severely shot, wounded and arrested and taken into custody by said sheriff, James McMillan, who immediately summoned the plaintiff, a practicing physician and surgeon, directing him to attend said Dower and render him, the said prisoner, all necessary medical aid and attention, and charge the same to Escambia County."

A demurrer directed to the complaint raising the point that Dower had never been taken into custody and that Dower was not confined in jail on a criminal charge at the time the services were rendered him, was sustained by both the trial and Supreme Courts. In view of the allegation "that James McMillan, Sheriff of said county, with lawful warrant of arrest, did arrest or *endeavor to arrest,* etc.," the complaint may well have been defective. What the court would have said in the event the complaint had alleged a completed arrest is not shown in the opinion.

However, the following language does appear in the opinion:

> "It is plain that the statutes make provision only for persons who have been lawfully committed to and are confined in jail or in some other place instead of the jail where prisoners are removed on account of ill health or fire, under the provisions of Sections 4544 and 4545 of the Code (Sections 7200 and 7201 of the Code of 1907)."

Conceding that this is the law (although there is no mention of the jail in Section 7198, the word there being "prisoner"), the question is whether a hospital is a suitable place wherein it is proper for a sheriff to confine such a prisoner. To my mind undoubtedly it is. Surely in the event the sheriff had taken the wounded prisoner to the jail and then to the hospital the county would be liable. It is a maxim that the law does not require the doing of the useless thing, and this maxim is especially applicable in emergencies. It seems to me that the hospital is the proper place for a severely wounded prisoner and if such a prisoner is unable to provide medical attention for himself and the services to him have been authorized by the sheriff, the

county may pay for these services, if deemed reasonable under the circumstances.

Very truly yours,
MARION RUSHTON,
Special Assistant Attorney General.

TAX ADJUSTERS:—Compensation based on abstract of assessment as completed by October 10th of tax year.

January 7, 1922.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My Dear Sir:

Your letter of October 27, 1921, to the Attorney General, Hon. Harwell G. Davis, in relation to the salaries of tax adjusters has been by the Attorney General referred to me for attention.

It is my opinion that what you call "an abstract of assessment" which is required to be completed not later than October 10th of each tax year, of necessity must be made the basis for fixing salaries or compensation of county tax adjusters. The fact that the assessed valuation as shown by this abstract of assessment must be changed on account of errors, insolvency or escape taxes cannot in any manner change the compensation allowed by the statute to tax adjusters.

I am constrained to this opinion for the reason that the statute (Acts 1919, page 309), clearly contemplates that the salary or compensation of the tax adjuster should be fixed and monthly payments made before these possible changes in the assessed valuation of property can be ascertained or made, and there is no provision to be found in the statute authorizing any additional payment in the event the assessed valuation should be increased, and likewise no provision requires the officer to refund or repay any amounts which will be in excess of his salary, if the changed valuation should form the basis of fixing his salary. I am constrained to this opinion for the reason that I find in the same revenue act which fixes the salaries of tax adjusters and tax assessors that when it comes to deal with the sala-

ries or compensation of tax assessors that it does provide that assessors shall be entitled to the same fees for making returns of property which has escaped taxation as for making return of property after a demand by him on the taxpayer, and it also provides that no fees shall be allowed an assessor for any return made in disregard of the provisions of Section 62 of the Revenue Act. (Acts 1919, page 304.)

It is therefore my opinion that the commission cannot revise the salaries which have been paid for the past year which had been theretofore fixed in accordance with the "last preceding assessment." What you call in your letter an "abstract of assessment" is in my opinion the last preceding assessment within the meaning of the statute.

Yours very truly,
JAMES J. MAYFIELD,
Assistant Attorney General.

TAXATION:—Locus for assessment of shares of stock of corporations to shareholders.

January 18, 1922.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Montgomery, Ala.

Dear Sir:

Your letter of the 5th instant relative to the above matter has been referred to me by the Attorney General for reply. You say: "We would like for you to advise us whether in your opinion:

1. "The capital stock of corporations under Section 12 should be assessed at the principal office of the corporation in fact, or at such office as may be designated as the home or principal office by action of the stockholders of the corporation.

2. "Whether the assessment of stock owned in foreign corporations by domestic corporations should be assessed at the chief office in fact, or at the office designated as the chief office by vote of the stockholders of the corporation."

1. It is my opinion that the corporation whose officers are stockholders has the legal right to designate the place or county of "the home or chief office in the State."

2. If such office is so designated by the corporation in good faith and the corporation has made out and returned under oath to the assessor of the county in which the home or chief office so selected and designated by the corporation is situated, a list showing the total number of shares of capital stock of such corporation, the par value, etc., as required by the statute, this place so designated by the corporation as its home or chief office will be binding on the State Tax Commission, notwithstanding it may have other offices and places of business in other towns or cities in which it does or transacts even more business than is done in the place designated as its home or chief office.

I know of no provision that prevents a corporation from having more than one place of business in the State, and the law seems to confer upon the corporation the right to designate which of several may be its home or chief office.

Of course this selection or designation of its home or chief office must be done in good faith to the extent at least that the place so designated is an office of the corporation at which place it does business in good faith. No corporation of course has any more right to evade the law than it has to violate the law. A corporation which in truth and in fact had its chief or sole place of business within a town or city could not by merely designating some place outside of the city in which it had its chief or sole office, and by merely calling or designating it as "its home or chief office" make it such within the meaning of the statute. The place so designated must in truth and in fact be a *bona fide* office and place of business of the corporation, but the mere fact that it did more business in some other place than it did at this place so designated as its home or chief office would not make the place at which it did most business its home or chief office within the meaning of the revenue law as the place for assessing the shares of stock of such corporation for taxation.

The foregoing is my opinion and conclusion as to the law which should govern and control as to place of assessment of shares of stock of a corporation, as to which you inquire. To state my conclusion succintly and a little differently, it is this: A corporation, and not the Tax Commission, jury or court, has the right to select the home or chief office of a corporation for the purpose of the assess-

ment of shares of stock in the corporation. The selection or designation of the corporation must of course be done in good faith. The place selected must in truth and in fact be an office or place of business of the corporation, but the mere fact that the corporation might do more business in some other place than the one designated or selected by it, would not thereby make the place at or in which it did most of its business its home or chief office for the purpose of the assessment of shares of stock of the corporation for taxation.

Very truly yours,
JAMES J. MAYFIELD,
Assistant Attorney General.

COUNTY WARRANTS:—Interest-bearing warrants issued during year ending September 28, 1920, might be issued under either the void 1919 Act or under previous statutes. Unless issued in compliance with said statutes, they are illegal in entirety.

January 19, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

On March 28, 1921 this office advised you as follows:

"The Court of County Commissioners or like governing body, is not vested with the power to indiscriminately issue interest bearing warrants for all obligations of the county. The authority to issue interest bearing warrants is limited to those matters relative to which the Commissioners Court is empowered to contract and the agreement to pay interest must be supported by a valuable consideration. There is, therefore, no authority to issue an interest bearing warrant for the financial obligations of the county where the obligation was not created by the contract of the Court of County Commissioners or where the agreement to pay interest is not based on a valuable consideration.

Board of Revenue, Shelby Co. v. Farson, Son & Co. 197 Ala. 375; 72 So. 611;

Stone, Co. Treas. v. Jett-Muths Constr. Co., 85 So. 443;

Talley v. Commrs. Court. 175 Ala. 644; 39 So. 167;
Littlejohn v. Littlejohn, 195 Ala. 614; 71 So. 448;
O'Rear v. Sartain, 193 Ala. 275; 69 So. 554;
Town of Eutaw v. Coleman, 189 Ala. 165; 66 So. 646.
Matkin et als. v. Marengo Co. 137 Ala. 155, 34 So. 171;
Ala. City, G. & A. R. R. Co. v. City of Gadsden, 185 Ala. 263; 64 So. 91;
Covington Co. v. Merrill, 193 Ala. 538, 69 So. 971.

You now wish to be advised as to the effect of Sections 2, 3, 4, and 5, of the Act of 1919 (Acts 1919, page 903) upon warrants issued for purposes therein stated following its approval. More particularly you ask three questions:

First: Does the 1919 Act limit the general authority which Commissioners' Courts had at the time of its passage to issue interest bearing warrants so that warrants issued for the purposes therein stated without compliance with this Act are illegal?

Second: Can such warrants be issued on the general authority possessed by Commissioners' Courts prior to the passage of the 1919 Act without regard to Sections 2, 3, 4 and 5 thereof?

Third: If warrants issued without compliance with the above sections are illegal in their entirety or merely as to interest?

You do not state specifically at what time the warrants in question were issued, nor for what specific purpose of the many enumerated in the 1919 Act. However, as the matter is of general interest, I shall endeavor to answer your question in its several phases.

Counties do not have the power to issue interest bearing warrants as an incident to their creation, and this right to be possessed must be conferred by the Legislature.

Gunter v. Hackworth 182 Ala. 205.
Brown, Treasurer, v. Gay-Padgett Hardware Co. 188 Ala. 428.

In the case of Littlejohn v. Littlejohn, 195 Ala. 614, it was said that the power to incur a debt or liability for "The erection of necessary public buildings, bridges, or roads,"

was expressly recognized by Section 215 of the Constitution, and the authority of the county to issue interest bearing warrants for those purposes, was upheld. In 1915 (Acts 1915, page 105) the Legislature authorized counties "to make temporary loans in anticipation of the collection of taxes." In 1919 the Act referred to by you was passed and went into effect on the 30th day of September, 1919 (Acts 1919, page 905). However, the enacting clause was omitted from the 1919 Act and it is therefore unconstitutional. In 1920 the Legislature re-enacted the 1919 Act (Acts 1920, page 10) and specifically provided in an added section, No. 8½, and also by a separate Act (Acts 1920, page 14) that all warrants and coupons issued pursuant to the 1919 Act should be ratified and made valid. These Acts of 1920 became effective September 28, 1920. It would seem that as a result of this legislation interest bearing warrants for roads, bridges, and necessary public buildings were authorized previous to 1915; from 1915 to September 28, 1920 interest bearing warrants for any valid contract obligation of the county might be issued under the 1915 Act. From September 28, 1919 to September 28, 1920 interest bearing warrants were valid if issued either under the 1915 Act or the 1919 Act. Since September 28, 1920 interest bearing warrants for the purpose enumerated in the Act of 1920 must be issued according to the terms of the 1920 Act.

Answering your first and second question then, I advise you that it was not necessary to comply with the terms of the void Act of 1919 during the period from September 28, 1919 to September 28, 1920, and interest bearing warrants issued for proper purposes under the law as it stood previous to the 1919 Act were valid. During the same period interest bearing warrants issued under the void 1919 Act are now validated by the 1920 Act. So that during that period valid warrants might be issued under either statute. Previous to that period their validity was governed by the Constitution and the Act of 1915. Since that period their vadidity is governed by the Act of 1920. In answer to your third question I advise you that if the warrants are not authorized by the Act or Acts pertaining to their issuance, and if the terms of those Acts have not been complied with, the warrants are illegal for all purposes, for under no principle of statutory construction can an unsuccessful attempt

to issue an interest bearing warrant result in the proper issuance of a non-interest bearing warrant.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

POSSE COMITATUS:—No authority to use county funds to pay citizens summoned to assist sheriff in guarding prisoner during trial.

January 21, 1922.

Hon. Thomas E. Kilby,
Governor,
Capitol.

My Dear Sir:

The inquiry of Sheriff J. N. Corbitt, of Henry County, with reference to compensation for twenty-five men summoned to assist in guarding a prisoner on trial for murder has been referred by you to this offce for answer. It is stated that the Commissioners' Court of Henry County is willing to pay these men for their services, but that there is no law authorizing such disbursement of the county funds.

These men are to be considered either as deputy sheriffs, or as members of the *posse comitatus* and in neither case do I find a provision permitting them to be paid from county funds.

Deputy sheriffs in counties of less than eighty thousand population are appointed and paid by sheriffs.

Code Section 5869, Acts 1915, 382, Acts 1919, 792.

It is a general rule which comes down to us from common law that every citizen capable of bearing arms is bound to yield a prompt obedience when called to the assistance of the sheriff or authorized peace officer to assist in enforcing the law. (Code Section 7518). Anciently it was a contempt against the king's prerogative to neglect to join a *posse comitatus* or power of the county upon being thereunto required by the sheriff or justices.

Blackstone's Commentaries Chase's Ed. pp. 90-899.

While I find no statutory penalty for the failure of a citizen to assist the sheriff or other police officer on such occasions. neither do I find any provision for compensation

by the county, and under familiar principles unless there is such an authority to pay out the county funds, such disbursements are unauthorized.

Compensation for guards who assist in *removing* prisoners in order to insure their safety or upon *habeas corpus* or change of venue proceedings, is authorized by Code Sections 6642, 6648 and 7048 respective. There seems to be no provision, however, for the compensation of persons who assist in guarding prisoners during trial. This is a duty which devolves upon our citizenry by virtue of its citizenship, and which must be performed without compensation.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

COUNTY WARRANTS:—Both probate judge and county depository are liable on their official bonds for warrants drawn and paid illegally.

January 23, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

You have requested an opinion as to whether or not the judge of probate and county depository of Winston County, are each liable on their official bonds for the misappropriation of special funds of the county; the misappropriation consisting in the use of the special fund for purposes other than that for which it was created.

The Act of 1915 (Acts 1915, page 348) which creates county depositories and abolished county treasurers provided:

> "The bank or banks so designated as depositories for county funds shall be charged with all the duties and subject to the same liabilities in so far as the safe keeping and paying out of the funds of the several counties are concerned, as are now imposed by law upon county treasurers."

The same Act also provides that the judge of probate and the president of the Board of Revenue or Court of County

Commissioners shall draw and sign all warrants and that "such officer signing such warrants to be liable for the amount of any warrant drawn and paid by such depository without the authority of law." By Sections 2206 to 2209 of the Code, special funds of the county are required to be kept separate and apart from other funds, and by Section 6829 it is a criminal offense for any officer or agent of the county to devote special funds for general purposes.

These provisions have been considered by our Supreme Court and the liability of both the judge of probate and president of the county board and of the depository has been declared.

Searcy v. Cullman County, 199 Ala. 287.
Kaiser v. Bird, 199 Ala. 83.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

SHERIFFS:—Should keep full and accurate records of cost of feeding prisoners.

January 24, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

In reply to your inquiry of the 16th instant, it is my opinion that the examiners of public accounts would have no authority to charge back to the sheriff the full amount which had been paid him by the state for feeding prisoners. These amounts of course have been allowed, and payment required under decision of the Court of Appeals, which decision was affirmed by the Supreme Court on *certiorari*. It was decided in this case, that the sheriff was not required to file with the auditor his acccounts showing expenditures which he had made for food purchases. The court also decided that the failure of the sheriff to comply with the rules and regulations of the prison inspector which the Act of 1920, page 24, authorizes him to make and promulgate, could not deprive a sheriff of his right to compensation provided he had complied with the requirements of the statute above

referred to as to the account or settlement required of him to be filed with the auditor. In other words, if the auditor can be compelled by mandamus to issue the warrant to a sheriff who has failed to comply with the regulations prescribed by the prison inspector, or who has made out a false account, as complained by the inspector and auditor, I do not think that the examiners of public accounts could, after the issuance of this warrant, and the payment of the amount due thereunder, charge it back to the sheriff.

It was decided by the Court of Appeals in the case of State ex rel. Chandler v. H. F. Lee, State Auditor, that the prison inspector had a right under the statute above referred to to make rules and regulations as to feeding prisoners, and that violation of such rules and regulations would be a misdemeanor. It is also certain that a sheriff who would make out a false account and receive payment thereof from the state for feeding prisoners, would be guilty of a crime and on conviction should be punished as if he had stolen the money.

Section 7474 of the Criminal Code.

Section 7473 of the Code also requires sheriffs to enter in a book to be kept by him any account paid him by the state for feeding prisoners, and to lay such book before the grand jury at each term of the circuit court, and to turn the same over to his successor, and makes his failure to comply with this section a misdemeanor. The Act of the Legislature, approved August 20, 1915, page 287, requires such officers and servants of the state to make and accurately keep in their offices or places of business all such books, documents, files, papers, letters, etc., as at all times to afford full and detailed information in reference to the activities or business required to be done or carried on by such officers or servants, from which the actual status and condition of such activities and business can be ascertained without any extraneous information, etc. Section 6 of the same Act provides that any officer or servant violating any of the provisions of this Act, if such violation is of such a nature as to render it impossible or impracticable to ascertain the correct status of the business, affairs, or finances of his office without extraneous evidence, such a violation

shall constitute a felony, and shall be punished by imprisonment for not less than two nor more than ten years.

Therefore, if any sheriff is guilty of violating any of the provisions of these acts, he subjects himself to the crime mentioned in the statute, some of which, if not all, would subject the sheriff to impeachment. Under Section 7099 of the Criminal Code, any of the wrongful or illegal acts of the sheriff above mentioned would certainly constitute "willful neglect" of duty or "corruption in office," either of which subjects him to impeachment before the Supreme Court of the State. It therefore seems that it is right as well as the duty of the examiners of public accounts when examining the office and books of sheriffs as to compensation for feeding prisoners, and also of the prison inspector to call the attention of the sheriffs or their deputies and jailers to these statutes, which we have above referred to, and that if the sheriff is found to be violating these statutes to report the matter to the proper prosecuting officers, and grand juries, so that the laws may be enforced.

Very truly yours,
JAMES J. MAYFIELD,
Assistant Attorney General.

HIGHWAY DEPARTMENT:—No authority to pay traveling expenses in campaign for road bond election.

February 9, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

Answering your inquiry of today, I beg to advise that there is no provision permitting the expenditure of funds of the Highway Department to pay the traveling expenses of anyone for the purpose of aiding in the campaign for the Road Bond election recently held in this State. The funds under the control of this Department can be expended only for those purposes enumerated in the statute.

The members of that Department might find that the election of a certain person for Governor would be beneficial, or perhaps necessary, for future road development in this

State. This, however, would not give them the right or authority to use funds for a purpose for which the Legislature did not appropriate such funds. An expenditure for traveling expenses to aid in a political campaign is entirely illegal.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

TAXATION:—Authority of County Commissioners to exempt cotton mills and other property from taxation under and by virtue of sections 2062 and 2063 of the Code.

February 21, 1922.

Hon. Jno. S. Mooring, Chairman,
State Tax Commission,
Capitol.

My Dear Sir:

Replying to your inquiry of recent date about the above named subject, which has been referred to me by the Attorney General, I beg to advise you as follows:

The only colorable authority of county commissioners to exempt cotton mills from county or other taxes is Section 2062 and Section 2063 of the Code of 1907. These sections are codifications of the Revenue Act of 1901 and 1903. These sections, according to my understanding, were certainly repealed by the Revenue Act of 1915, Acts 1915, page 386 et seq. It is probable that these sections were repealed by the Revenue Act of 1911, but this is not at all certain. But I do feel that they were repealed by the Revenue Act of 1915. The Revenue Act of 1915 unlike its immediate predecessors Acts 1911, 1907, 1903, etc., did not attempt to amend certain provisions of the Revenue Law as contained in the Code, but rather reenacted the Code provisions with certain omissions and additions, not reenacting in terms but in substance and in effect, with certain omissions and additions to the previous Revenue Law.

It will be observed that the Revenue Act of 1915 reenacted Section 2061 of the Code almost literally, then entirely omitted Sections 2062 and 2063, or any reference thereto,

then practically reenacted Section 2064 of the Code. This shows a clear legislative intention to repeal or to omit from the Revenue Law Sections 2062 and 2063 of the Code. If these sections of the Code were repealed by the Act of 1915, of course they were not in effect, and were not the law when the Revenue Bill of 1919 was passed. It is true that Section 5 of the Revenue Act of 1919, Acts 1919, page 284, provided that "the subjects of taxation, except as exempted by existing laws, shall be as follows." Sections 2062 and 2063 not being existing laws at that time could not have been included within the above exception.

Moreover these sections conferred authority on the county commissioners to exempt and we know of no other statutes conferring such authority since the repeal of these two sections of the Code. If there be any such provisions we have been unable to find them.

We are also led to this conclusion by reasons of the fact that Section 70 of the Constitution contemplates, if it does not require, a revision of the Revenue Laws at every regular session of the Legislature, and such revision has been made so far as we recall at every regular session of the Legislature. Sometimes, however, this is accomplished by merely amending certain sections of the Code or certain sections of previous Revenue Bills. But the Revenue Acts of 1915 and 1919 were each in effect an entire and complete revision of the Revenue Laws, except such provisions as were expressly preserved by reference thereto in the respective Revenue Acts, and we find no reference to Sections 2062 and 2063, which would save them from repeal. We are further confirmed in our opinion by reference to the present Revenue Law of 1919. The bill as it was introduced into the Legislature, the bill as drafted and proposed by the Governor, Attorney General, and Auditor, substantially contained the same provisions as are to be found in Sections 2062 and 2063; but the Legislature during the passage of the bill amended it by striking out or eliminating these provisions. This, of course, is a very strong circumstance showing that the Legislature did not intend that these provisions should constitute a part of the Revenue Act of the State.

It is a rule of construction that a subsequent statute revising the whole subject matter of the former one, and evi-

dently intended as a substitute for the former, repeals it although it contains no express words to that effect.

Prowell v. Hasty, 142 Ala. 80.

Very truly yours,
JAMES J. MAYFIELD,
Assistant Attorney General.

TRIAL TAX—Required to be taxed and collected as other costs in circuit court.

February 23, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

It is my opinion that when a bill of costs is made out by the clerk of the circuit court and a certain amount is paid thereon, leaving a balance uncollected and which on account of the insolvency of the party against whom judgment is rendered, cannot be collected, the amount so collected should be pro-rated as to the several items of costs and fees as for which the judgment was rendered in that particular case.

Neither the clerk nor the sheriff would be entitled to apply the amount so paid under such conditions exclusively to their fees in such case. There is a fundamental distinction of course between costs and fees, but under chapter 70, Sections 3662 to 3729 of the Code, all costs and fees are as a rule taxed against the losing party and judgment is rendered in favor of the successful party as for both costs and fees, and, of course, execution may and should issue against the losing party as for all the costs and fees unless they are paid voluntarily. If a part only is paid or collected, such part should be pro-rated among all the creditors as to both costs and fees.

Circuits courts as well as chancery courts are now authorized to apportion costs among the parties, so it does not now necessarily follow that the losing party must pay all costs and fees, but they must do so unless the judgment or decree of the court otherwise directs. In the event that all costs and fees cannot be collected from the losing party,

or against whom such judgment or decree is rendered as for such costs and fees, the Code provides for an execution then issuing against the party at whose instance or request the costs or fees were incurred.

Of course, the primary duty is upon the clerk to issue the executions both as for costs and fees when they are not paid voluntarily. He must issue at the time, in the mode and manner provided by the statute. When execution is issued the duty is then, of course, upon the sheriff to collect it. Neither the clerk nor sheriff could have a right to apply money paid as for costs and fees exclusively to the payment of their claims, when there was not enough to pay in full all claims as for costs and fees.

Very truly yours,
JAMES J. MAYFIELD,
Assistant Attorney General.

REGISTRATION OF ELECTORS.—Compensation to clerical assistants necessary to prepare lists of electors for elections, held after November 2, 1920, and prior to May 1, 1922.

February 28, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

> "Are claims for clerical assistance which was necessary to properly prepare lists of qualified electors for the use of election inspectors of the elections held February 8, 1921, April 12, 1921 and June 7, 1921, proper charges against the county?"

This question was submitted to this office and answered in the negative by a ruling dated January 10, 1922. There has been a request that this ruling be reconsidered and upon investigation, I am convinced that there is merit in this request.

Section 36 of the present Registration Law, (Acts Special Session 1920, page 135) provides as follows:

> "Clerical Assistants to Make Inspection List.—The judge of probate is authorized to employ such assis-

tants and clerical help as may be necessary to complete and properly prepare the lists of qualified electors which the judge of probate is required to furnish the election inspectors. Such assistants shall be paid out of the county treasury by warrant, etc. . . ."

From the quoted provisions of this section, it is evident that these claims are proper charges against the county if the judge of probate was required to prepare and furnish lists of the qualified electors for the use of the election inspectors of such elections.

Section 35 of this act provides for the preparation and furnishing to the election inspectors of the general election held November 2, 1920, of a list of the qualified electors. This section provided that such list should be the official list for the general election held November 2, 1920. The wording of the sections is convincing that the list provided for by Section 35 was limited to being the official list for that particular election, and was not to be the official list of qualified electors for any election held subsequent to said general election of November 2, 1920.

Section 18 of this act provides for an official list of qualified electors for all elections, but this official list is not completed until May 1, 1922, and of necessity could not in any way be construed as being intended as the official list for elections held prior to May 1, 1922. It follows that neither the list of qualified electors provided by Section 35, nor the list of qualified electors provided by Section 18 of this act, was intended by the Legislature as the list of qualified electors to be furnished to election inspectors of elections held after November 2, 1920, and prior to May 1, 1922.

Section 19 of the act provides:

"List of Voters and Electors.—The judge of probate shall, from the registration list returned to his office, including those registered prior to January 1, 1903, make correct alphabetical lists of the qualified electors registered by precincts which lists shall be certified by him officially to be a full and correct copy of the lists of registered electors for each precinct respectively as the same appears from the returns of the board of registrars on file in his office. One copy of said list for each precinct the judge of probate shall deliver or cause

to be delivered to the inspectors in each precinct immediately preceding every election or primary."

The judge of probate is charged by the provisions of this section with the duty of making "alphabetical lists of the *qualified electors* registered by precincts." It is true that the other provisions of the section provide that it shall be certified to be a correct copy of "registered electors" as the same appears from the return of the board of registrars. When, however, you consider that the purpose of this act declared in the caption thereof is "to provide for * * * the preparation and furnishing of a list of *qualified electors* to the election inspectors," and that the purpose of the list which is furnished by the judge of probate to such election inspectors is to provide information available to the inspectors as to who is qualified to participate in the election, it becomes certain, regardless of the confusing provisions, that the list required by Section 19 to be prepared and furnished by the judge of probate is a list of *qualified electors.*

It is also certain that the Legislature intended making provisions for every election to be held after the passage and approval of this act. Sections 41 and 42 of the act are conclusive that the act was intended to be exclusive of all previous provisions of the law relative to the subject under consideration. To hold that Section 19 of this act did not provide for the preparation and furnishing of a list of qualified electors to the election inspectors of elections held between November 2, 1920 and May 1, 1922, would not only deprive Section 19 of any field of operation, but would also leave no provision for furnishing any list of qualified electors as a guide to such election inspectors. It would be unreasonable to presume that the Legislature intended a construction to be given to the act which would produce such a result.

I am of the opinion that the former ruling of this office, though following the technical wording of the statute, should be modified, and that the examiner of accounts should allow these claims as proper charges against the county.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

DISTRICT SCHOOL TAX:—Proceeds should be kept by treasurer of school funds in separate fund for exclusive benefit of district.

March 1, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

Through Mr. E. A. Henry, Examiner of Accounts, you state that the County Board of Education of Conecuh County has made it a practice to cover the three mill *district* school tax levied upon and paid by certain school districts into the general educational fund of the county, where it is kept in an account known as the "County Board Account." From this account money is expended for the general educational purposes of the county, the Board regarding the district funds as a "loan from the district and assuming the responsibility of getting it back to the credit of the district from which it was borrowed."

You wish to be advised whether or not this practice is improper under the school act of 1919 (Acts 1919, page 612), and if it is improper, whether or not it can be made "regular" by the production of vouchers showing that such funds or their equivalent were in fact spent for the benefit of the school district from which they came.

By Section 8 of Article 12 of the School Law above referred to (Acts 1919 page 612) it is provided:

> "Whenever such a levy as provided for in this Article is made it shall be the duty of the tax collector within and for that county to collect such a tax in the same manner and under the same requirements and laws as the taxes of the state are collected, and he shall keep such said amount separate and apart from all other funds, and keep a clear and distinct account thereof, showing what amount is paid, and turn the same over to the county treasurer of school funds, whose duty it shall be to receipt therefor, and pay out the same on monthly pay rolls, with the authority and approval of the county board of education upon uniform blanks prescribed by the state superintendent of education; provided that the funds arising from levying the special tax for school purposes in any school district shall

be used for the exclusive benefit of the public schools of such district."

The intention that district funds should be used only for the benefit of the district from which they are derived could hardly have been expressed in clearer language. It is also clear that the "county treasurer for school funds" (See Acts 1919, pages 584 and 614) is to pay out the money which he had received "on monthly pay rolls" and "upon uniform blanks prescribed by the state superintendent of education" after the account has received the approval of the county board. No other means of disbursement seems to be provided in the act. From these provisions it seems clear to me that the Legislature intended that district funds be kept in separate accounts by the county treasurer of school funds, and paid out only in the way prescribed by the statute. For any other use or intermingling, the county treasurer of school funds would, in my opinion, be liable on his bond in case of loss; and in the event an improper motive for such misappropriation could be shown, an indictment would lie.

No irregularity in dealing with public funds can be made regular by any device other than complete compliance with the laws regulating the receipt and disbursement of such money. However, where public officers show a disposition to act in accordance with the law, and mistakes due to lack of information and misinterpretation of statutes are corrected so as to cause no loss to the public, usually no action is taken. In the present instance the production of adequate vouchers demonstrating that district funds were ultimately expended for district purposes only, will do much toward showing the good faith of transactions which certainly are not authorized by law.

Very truly yours,

MARION RUSHTON.
Assistant Attorney General.

DISTRICT SCHOOL TAX:—For municipality, collected upon delinquency in manner provided for collection of State and county taxes.

March 7, 1922.

Hon. Jno. W. Abercrombie,
State Superintendent of Education,
Capitol.

My Dear Sir:

Your letter from Hon. J. K. Dixon, Chairman of the Board of Education of the City of Talladega, of February 9, 1922, has been by the Attorney General referred to me for answer.

The question propounded in Mr. Dixon's inquiry is whether or not the tax collector of Talladega can proceed as deputy county tax collector to report defaulted taxes as to the special school district tax for Talladaga County, and thus have the County Tax Collector for Talladega County certify the defaults to the probate judge and have the property sold by order of the probate judge as other property is ordered to be sold for the payment of state and county taxes generally.

I regret to report that the law is not clear or certain as to whether default in taxes levied under the special school taxes of Talladega County should be collected including sales of property for that purpose, when necessary, as the collection of other municipal taxes are enforced, or whether as for defaults of county and state taxes. The uncertainty grows out of a proviso to Section 3, Article 12 of the school code, Acts of 1919.

Section 8 of Article 12 of the school Code provides that it shall be the duty of tax collectors within their respective counties to collect such tax in the same manner and under the same requirements and laws as the taxes of the state are collected and keep the amount thereof separate and apart from other funds, how they shall be paid over, etc. But one of the provisions to this same section is that in case of cities of two thousand or more inhabitants, the city tax collector, unless otherwise provided by law, shall collect and pay over the same to the treasurer of said city to be used exclusively for school purposes, etc.

This proviso creates the uncertainty and doubt. Does this proviso restrict or prohibit the right of county tax

collectors to collect such taxes as to cities of two thousand or more inhabitants or is it merely directory or as an alternative mode of collecting taxes? It could not apply to all cities of two thousand or more inhabitants, for the reason that all cities do not have tax collectors. The taxes are collected by other municipal officers, and it would be a question whether the statute could be construed to extend to any other officer who might collect taxes for the city.

Moreover the taxes in question are not municipal taxes in the ordinary or even in the constitutional sense. They are both levied and assessed as county and state taxes and not as municipal taxes. The particular special tax is much more nearly related to county taxes than to municipal taxes, though they are limited to the territory or area of the city. The Constitution prohibits municipal taxes from being assessed as the taxes in question are assessed. Section 216 of the Constitution requires that municipal taxes shall be assessed at "the value of such property as assessed for state taxation during the preceding year." Consequently property is never valued as for municipal assessments, the municipality being required to accept valuations placed on the property for the preceding year and not for the present or current year.

The School Code provides that the court of county commissioners or Board of Revenue shall levy this tax and that it shall be assessed by the county tax assessor as other taxes are assessed, and that the tax shall be collected by the tax collector as other state and county taxes are collected, except as mentioned in this proviso, which unfortunately includes Talladega. The enforcement of this tax by collection must be done by advertisement and sale, as is provided for delinquent taxes for state and county purposes, if the collection can be enforced by such sale. It would seem that the provisions of the municipal code as for sale of property for delinquent municipal taxes by Sections 1319 et seq. of the Code could not be applied to the special district school tax in question, but payment can be enforced by sales as for delinquent state and county taxes, as is suggested by Mr. Dixon in his letter to you.

Whether the city tax collector of Talladega, if such officer there be, be considered a deputy county tax collector for this purpose, or whether he acts as city tax collector, he

may report the delinquencies to the county tax collector who may include them in his report of delinquencies to the judge of probate and the sales for the purpose of collecting such delinquent taxes, he may proceed as for other state and county delinquent taxes.

In order to remove all the doubt about the legality of the proceeding, I suggest that the municipality of Talladega may act under Section 239 of the Revenue Act, (Acts 1919 page 352) providing for the collection of these delinquent taxes in question by the county tax collector for Talladega County, and may by such ordinance provide for the enforcement of such collection by the sale of property for the collection of state and county taxes. Such an ordinance in my judgment would be proper and would remove many doubts and uncertainties, if not all, as to the validity of sales of property for the collection of the special school district tax in question.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

SCHOOL DISTRICTS:—Assessment and collection of district school taxes, Mobile County.

March 8, 1922.

Hon. Jno. W. Abercrombie,
State Superintendent of Education,
Capitol.

My Dear Sir:

The above question has been referred to me by the Attorney General, Hon. Harwell G. Davis, with request that I give you an opinion as to whether or not it is the legal duty of the tax assessor of Mobile County to make the assessment by districts.

In so far as the assessment of the district school tax is concerned, it appears to me that there can be no reasonable doubt that it is the duty of the tax assessor to make the assessments by districts. Unless the school district should be coextensive with the county, the assessment would of necessity have to be made separately by districts. Your letter of December 19, 1921, to Hon. S. S. Murphy, Superintendent of Public Schools, Mobile County, seems to me to

be a full and clear exposition of both the law and the duty of tax assessors of the several counties of the state as to the assessment of the special school district taxes.

Section 6 of Article 12 of the School Code enacted and adopted by the Legislature 1919 makes it the duty of the assessor to assess these district taxes. The law provides that if the electors of the given districts have by a majority vote declared for such special school district tax, as is authorized by the amendment to the Constitution, that it then becomes the duty of the court of county commissioners, or other like governing body of the county, to levy said special tax, and

> "Cause the tax assessor to assess the same on the taxable property in said county, or in said rural or city school district as the case may be."

It is therefore the duty of the court of county commissioners or board of revenue, or other governing body of the county, to cause the tax assessor to levy the taxes.

As before stated, if the school district be less than the entire county, of course then the assessment would have to be confined to the district and could not be extended to territory or to property outside of the district which had voted the special school tax. This of necessity would require a special and separate assessment of this particular property within the district for this particular purpose. To make this doubly sure, Section 8 of Article 12 expressly provides that the tax collector of the county shall keep a separate accounting of the district school taxes. Such tax shall be kept separate and apart from all other funds and such tax shall be paid over to the county treasurer of the school fund and the funds derived from such special district school taxes shall be used for the exclusive benefit of the public schools of such districts.

If there can be any doubt that it is the duty of the assessor to make a separate assessment for each school district in his county, the provisions of Section 8, Article 12, above referred to, would remove that doubt. These provisions are so plain and simple that it occurred to me that probably the tax assessor and collector of Mobile County were failing or refusing to comply with the above provisions of the school code, upon the ground that those provisions

did not apply to Mobile County by reason of Section 270 of the Constitution. This contention, however, I do not believe can be sustained for the reason that these special district school taxes are authorized by an amendment to the Constitution of this state, which amendment was adopted and proclaimed November 22, 1916, and which applies and extends to Mobile County as well as any other county. (Amendments to the Constitution by N. H. Seay, pages 2 and 3).

It will be observed that Section 3 of this amendment provides that the funds arising from the special county school tax levied and collected by any county, shall be apportioned and expended as the law may direct and the funds arising from the special school taxes levied in *"any district"* which votes the same independently of the county, shall be expended for the *"exclusive benefit of the district,"* as the law may direct.

The statutes above referred to have followed this provision of the Constitutional amendment and certainly remove all doubt as to the validity of the statutes with respect to special and separate assessment for each district which was not coextensive with the county. Unless separate and distinct assessments should be made as to each district which was less in area or territory than the entire county, the provisions of the Constitution and the statutes could not be complied with.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

REGISTRARS OF VITAL STATISTICS:—Compensation is preferred claim against county.

March 11, 1922.

Dr. S. W. Welch,
State Health Officer,
Montgomery, Alabama.

My Dear Sir:

Your letter of the 6th instant contains the following inquiry:

"Is the claim for compensation of local registrars provided for by subdivision 20 of the State Health Law a preferred claim?"
Acts 1919 page 926.

That part of subdivision 20 necessary to the determination of this question reads as follows:

"All amounts payable to a local registrar under the provisions of this section shall be paid by the treasurer of the county in which the registration district is located by certification by the state registrar."

From this provision it will be seen that the obligation of the county to pay such local registrars is absolutely fixed by law. In the case of Brown, Treasurer, v. Gay-Padgett Hardware Company, 188 Ala. 423, the Supreme Court held

"That the obligations absolutely fixed by law are preferred claims."

Under the provision of the statute and this rule of the Supreme Court, I am of the opinion that the claims of such local registrars are preferred claims next after those claims enumerated by the statute (Section 153 of the Code as amended by Acts of 1919, page 1110) are paid.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COMMON CARRIERS:—Power of Public Service Commission to fix and regulate schedules of passenger trains.

March 21, 1922.

Hon. Hugh White, Secretary,
Alabama Public Service Commission,
Capitol.

My dear Sir:

Re: Schedule or Stops for Trains No. 43 and 44 of A. G. S. R. R. Company

There can be no doubt that the Alabama Public Service Commission has been by the Legislature of this State delegated with full and plenary powers as to prescribing reas-

onable rules and regulations for the operation of passenger trains and common carriers in and through this State. Included in this authority and power, and as a part thereof, is the power to prescribe reasonable rules and regulations as to the places at which passenger trains shall be stopped for the reception and discharge of passengers on such trains. The power to prescribe these reasonable rules and regulations will, of course, deny or exclude the right of the carriers to disregard or evade the reasonable rules and regulations when so prescribed and fixed by the Public Service Commission.

If the Commission has fixed or prescribed the stops which certain passenger trains shall make in this State or if the carrier has by a schedule prescribed and fixed the stops which certain trains in this State shall make, and the Commission has approved such schedules, this schedule so fixed should remain until the Commission has fixed a different schedule for such trains, or until the carrier has, with the approval of the Commission, fixed or made a different schedule for such trains.

When a schedule as to any passenger train has been once so legally fixed and established, it cannot be lawfully changed by the carriers, or another schedule established or fixed for such train, without the consent or approval of the Commission.

Whether or not the Commission should or should not put into effect a given schedule for a given train in this State, or whether or not a schedule once legally established should be changed, abandoned, or a new schedule made and provided, are questions which the law has placed in the discretion of the Commission and imposed upon it the duty to investigate and determine; and, of course, it would be usurpation of power for the Attorney General of the state to advise in advance as to what its action should be in a given case.

There are, of course, limitations upon the Commission's powers and authorities in the matters of prescribing rules and regulations as to the conduct and operation of passenger trains in this State. One of these limitations is that the rules and regulations prescribed by the Commission must

be reasonable and must not be confiscating the property of the carriers, nor unduly hinder or restrict them in the operation of their trains, so as to prevent them from best serving the public or prevent them from making a fair return upon their investments employed in the business.

Another limitation upon the Commission's power to fix or regulate schedules and stops for passengers trains in this State is that the rules and regulations must not directly or unduly interfere with, or regulate inter-state traffic or commerce.

The Attorney General cannot, however, in advance advise you as to whether or not you should act in a given case; or how you should act in such case; or whether or not your action would be reasonable or unreasonable, or unduly, or directly interfere with inter-state traffic or commerce.

The facts in such cases must be investigated by the Commission, and decided, or found by the Commission, before any question of law arises and when it does arise. I have given you my opinion above as to what the law is on the subject.

Yours very truly,
JAMES J. MAYFIELD,
Assistant Attorney General.

TAXATION:—Return by foreign corporation under provisions of revenue law applying to domestic corporations is not sufficient.

March 21, 1922.

Hon. Jno. S. Mooring,
Chairman, State Tax Commission,
Capitol.

My Dear Sir:

Re: Assessment of stock to share holders in the Gulf Dry Dock Company, of Mobile, Alabama.

Your letter of the 7th instant to the Attorney General relative to the above matter has been referred to me and I have examined the question in connection with the file of papers and correspondence in relation thereto.

It is my opinion that the copy of "tax return for assessment of shares of stock in corporations" which you have furnished the Attorney General does not constitute either

assessment or valuation of the shares of stock in foreign corporations, as is provided for in Subdivision I of Section 5 of the Revenue Law of 1919. It is my opinion that this was a tax return for the assessment of shares of stock in a domestic corporation and not a return assessment or valuation of stock in a foreign corporation.

It is perfectly evident to me that the assessment and return was made by the corporation and received by the tax assessor as an assessment of stock in a domestic corporation as is provided for in Section 12 of the Acts of 1919, and not under subdivision I of Section 5. It is perfectly evident that the failure to place any valuation upon the stock in the corporation was due to the fact that the assessment valuation of the physical property exceeded the value of the capital stock of the corporation, and therefore, in effect exempted the stock from taxation.

It is my opinion that the Gulf Dry Dock Company, which is conceded to be a foreign corporation, has not complied with the laws of this state in furnishing to the assessor a correct list of its stockholders in such sense to exempt its resident stockholders from the payment of taxes upon stock held and owned by them in foreign corporations. Neither the return nor the assessment showed that the Gulf Dry Dock Company was a foreign corporation. The corporation or its officers certainly knew when the returns were made that it was a foreign corporation and should have so informed the tax assessor.

As above stated the failure to place any valuation upon the stock could not be considered as a valuation. We are unable to agree that the return for assessment made by the corporation or the assessment made by the tax assessor can be considered as *res judicata* as to the amount of taxes due by resident stockholders in this foreign corporation; nor can we agree to the contention that the assessment made by the assessor upon the returns made by the corporation and his failure to value the stock as an assessment against the resident owners estops the state from now assessing the shares of stock in this corporation held by residents of this State.

It is my opinion that the stock should be assessed as escaped taxes and that the doctrines of *res judicata* and estoppal do not apply. I am unable to believe that the facts

in this case are sufficient to bar any assessment at this time of the shares of stock owned by residents of this state as an escaped tax.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

INFERIOR CIVIL COURT OF MOBILE COUNTY:—Collection of costs from successful plaintiff when execution against defendant discovers no property.

Hon. Chas. E. McCall, March 22, 1922.
Chief Examiner of Accounts,
Capitol.

My dear Sir:

You state that under the statutes which create the Inferior Civil Court of Mobile County, the fees and costs collected in the court are payable one-half to the judge and clerk thereof, and one-half to Mobile County; that the clerk of this court has taken the position that where a plaintiff has recovered judgment in his court against the defendant, and execution has been issued against the defendant and returned "no property found" that it was not the duty of the clerk to issue an execution against the plaintiff for the costs created by the plaintiff, and because of this position taken by the clerk, the County of Mobile has not received its share of the costs and fees in such cases. You wish to be advised whether or not the position of the clerk is correct.

In reply I beg to advise you as follows: The Inferior Civil Court of Mobile County was established under the Local Laws 1911 (Local Acts 1911, page 274) and the duties of the clerk were prescribed in Section 9 of the Act. Among them is the following:

> "It shall be the duty of said clerk to tax and collect in each civil case the same costs, fines and fees for the services of the judge and clerk and sheriff and witnesses as are provided under the laws of Alabama for justices of the peace and sheriffs."

At the time of the passage of this Act, April 15, 1911, the costs and fees of justices of the peace were prescribed

by Section 3724 of the Code of 1907, and the pertinent provisions of the Code governing the taxation of costs were contained in Section 3662. By Section 3701 it was provided that

> "The clerk of the Supreme Court, clerks of the circuit or city courts, judges of probate, and *justices of the peace,* and registers in chancery upon return 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, . . . may issue execution in their own names against the plaintiff and against the plaintiff and sureties as the case may be for the costs actually created by the plaintiff, but for none other, to be collected and returned as other executions."

Under this state of the law, the duty of the clerk of the inferior civil court of Mobile County, "To tax and collect costs as are provided under the laws of Alabama for justices of the peace" requires him to collect costs from plaintiffs even though successful under certain specific conditions.

To my mind, it makes no difference whether the Inferior Civil Court is a court of record or not.

I have been unable to find any legislation subsequent to 1911 which affects the Inferior Civil Court of Mobile County. It is true that Section 3662 was amended by the Legislature of 1915 (Acts 1915 page 598). It was provided in the amendment "That this act shall not apply to justices of the peace's courts, but that *in such courts the successful party shall recover his costs.*" This proviso has never been construed by our courts, but to my mind it is a limitation upon the discretion given the trial judge, by Section 3662 as amended, to apportion costs and would not change the law so far as justices of the peace are concerned from what it was during 1911. Further, the amendment of 1915 was a general law and under familiar principles of statutory construction, would have no effect unless specifically provided upon the Local Law of 1911.

I therefore advise you that in my opinion it was and still is the duty of the clerk of the Inferior Civil Court of Mobile County to collect costs actually created by plaintiffs, although such plaintiffs are successful, when execu-

tions for costs against the defendant are returned by the proper officer indorsed "no property found."

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

COSTS:—Witness fees in habeas corpus proceedings in excess of $150 paid from convict fund may be certified for registration against fine and forfeiture fund.

March 24, 1922.

Hon. N. S. Walker, Clerk,
Circuit Court,
Dadeville, Alabama.

Dear Sir:

The Attorney General has referred to me your letter of the 13th instant in which you ask the following question:

> "Should witness certificates in habeas corpus proceeding duly proven under Section 7042 of the Code, be certified for registration against the fine and forfeiture fund of the County, where conviction was had, for balance not paid by the State, upon the return of execution 'no property found'?"

You state that you had a case in which the witness fees in a habeas corpus proceeding amounted to a considerable sum and the Convict Department would not pay those fees.

Section 7042 of the Code referred to in your letter which appears in the chapter in the Code entitled "Habeas Corpus," provides that witnesses may prove their attendance before the judge or chancellor as in other cases and have the same taxed on the bill of costs on the subsequent conviction of the party where he is detained on a criminal charge.

It is held in the case of Gray v. Abbott, 130 Ala. 322, which you refer to in your letter, that it is the duty of the county treasurer to file and register State's witness certificates when duly authenticated, and the fact that such witness certificates have been paid in part out of the convict fund as provided by statute, constitutes no excuse for the treasurer's refusal to file and register such certificates as

a claim for balance due. In referring to the $150 paid by the State in criminal cases in which the defendant is convicted and sent to the penitentiary, the Court says that it was not the purpose of the Legislature by the enactment of the statute providing for this $150 payment, to abrogate and annul the statute fixing the per diem and mileage of State's witnesses.

I also invite your attention to the case of Banks v. Mobley, 4 Ala. App. 510, in which the court holds that witness fees in habeas corpus cases cannot be taxed in the main case unless there be a conviction, which decision is in line with the provisions of Section 7042 of the Code.

I am therefore of the opinion that witness certificates of State witnesses in habeas corpus proceedings proved duly under Section 7042 of the Code should be certified for registration against the fine and forfeiture fund of the county in cases in which defendant has been convicted and sent to the penitentiary and an execution against him returned "no property found," provided of course that the $150 paid by the State does not cover such fees.

You will observe that Sections 6660 and 6666 of the Code provide how witness fees shall be taxed and paid and certified by the Clerk.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

STATE BANKS:—May not deposit assets with surety company as collateral for bond as depository.

March 28, 1922.

Hon. H. H. Montgomery,
Superintendent of Banks,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 2nd instant wherein you inquire whether or not a State bank would have the legal right to deposit with a surety company a portion of its assets as collateral for the procurement of a depository bond. You state in this connection that heretofore banks have in the general course of busi-

ness pledged their assets to protect certain depositors but that it has occurred to you that there might be something which would prevent a bank from pledging its assets to a surety company to protect it for executing the depository bond.

Prior to 1903, bank charters were granted by a separate legislative act as to each such banking corporation. On October 2, 1903, however, a general law was approved for the incorporation of banks and other corporations and that part of said Act covering the powers of banking corporations was codified in the 1907 Code in Section 3518 which reads as follows:

> "Corporations formed for the purpose of carrying on the business of banking and trust companies doing a banking business, may discount bills, notes, or other evidence of debt, receive and pay out deposits, with or without interest, receive on special deposit money, bullion, or foreign coins, or stocks, bonds, or other securities; buy and sell foreign and domestic exchanges, gold and silver bullion or foreign coins, bonds, stocks, bills of exchange, notes, and other negotiable paper; lend money on personal security or upon pledges of bonds, stocks, or other negotiable securities; take and receive security by mortgage or otherwise on property, real and personal, issue bills to circulate as money, but only as, and upon the terms prescribed in Section 248 of the Constitution, and may become trustees for any purpose, be appointed and act as executors, administrators, guardians, and receivers, and do any business and exercise any powers incident to the business of trust and banking companies doing banking business."

It would of course be impossible to advise as to the powers conferred upon the various State banks in Alabama by the several legislative acts approved prior to 1903 and the charters of such banks would have to be examined for the purpose of ascertaining just what powers were conferred upon each of such banks.

An examination of Section 3518 of the Code will disclose the fact that no banking corporation organized since October 2, 1903, is specially authorized either to deposit its

assets or any portion thereof to protect certain depositors or as collateral for the procurement of a depository bond.

You will note, however, that Acts 1915, page 348, Section 4, being an Act "to abolish the office of the county treasurer and to require that the county funds be deposited in such incorporated national or state banks in the several counties, as the Board of Revenue or court of county commissioners may elect," etc., provides as follows:

> "The board shall require adequate bond of said bank to secure the safety of said deposit which bond shall be in the sum of $50,000 or such other sum as the court of county commissioners or board of revenue shall fix having due regard to the safety of the county funds."

I also refer you to Sections 641 to 655, both inclusive, of the Code of Alabama of 1907, which makes provision for State bank or trust companies incorporated under the laws of this State to act as depositories of State funds. It is here provided that any bank making application to act as a depository of State funds shall accompany its application with a deposit of bonds of the State of Alabama in an amount not less than $10,000 par value and that no State depository shall receive or have at any time an amount of moneys or funds in excess of the face value of such bonds actually deposited by it with the State treasurer; that any bank having on hand at the close of any day's business an amount in excess of the amount covered by deposited bonds shall remit the same to the State treasurer; that in the event of the failure of the depository to faithfully account for all such funds, the State treasurer shall forthwith sell the bonds deposited for the purpose of securing such deposits.

The fullest and clearest statement of the law which I have found touching the right of a banking corporation to pledge its assets in order to secure deposits or in order to protect and indemnify a bonding company which may execute as surety a bond to protect such deposits, is found in the case of Commercial Bank and Trust Company et al v. Citizens Trust and Guaranty Company of West Virginia, 45 L. R. A. (N. S.), 950.

In this case it appears that the county treasurer of Jefferson County, Kentucky, in which the City of Louisville is

located, made arrangements to deposit county funds with the Commercial Bank and Trust Company; that said bank obligated itself to furnish the county treasurer security in the sum of $100,000 to secure the safety of any and all deposits which he as such treasurer might make in said bank; that the Citizens Trust and Guaranty Company executed as surety a bond to protect the county treasurer against any loss on account of making such deposits, the Guaranty Company exacting of the bank a pledge of its liquid assets in the sum of $100,000 to secure it against loss; that the bank pledged with the said surety certificates of deposits and short time negotiable notes to the amount of $100,000, which were held by the Louisville National Banking Company under agreement between the bank and the Guaranty Company; that thereafter the bank was closed on the order of the banking commissioner of Kentucky who questioned by legal proceedings the validity of the above mentioned contract between the bank on the one hand and the treasurer and Guaranty Company on the other.

Upon a hearing of the case by the Kentucky Court of Appeals it was held that the arrangement above referred to was null and void and that the effort of the bank to protect one depositor in preference to another was discriminatory as against such other depositors, and was *ultra vires* of the corporation and that no bank can lawfully enter into any such arrangement unless there be express statutory authority therefor as in the cases of county or State depositories referred to above.

In the case above referred to the court says that banks can only be lawfully organized and authorized to conduct business in Kentucky as provided by the banking laws; that it was unquestionably the intention of the legislature to define and limit their powers by law so that all banks should conduct their legitimate business in the same manner, and that the public dealing with them might know the power they possess; that in this case the bank had exceeded its express power and under the claim of the exercise of an implied power had attempted to secure the payment of a depositor by the pledging of its assets which was clearly an act *ultra vires* and unlawful, no such power having been conferred upon banks in that State nor should authority to do so be granted any where; that Section 579 of

the Kentucky statutes granting such powers "as may be necessary to carry on the business of banking" refers to such things as might be necessary to do the particular acts mentioned in the statute. It therefore appears that the expression contained in Section 3518 of the Code authorizing banks to "do any business and exercise any powers incident to the business of trust and banking companies doing banking business," has a limited field of operation, being confined to such powers as may be incident to the doing of such business as is specially authorized in said Section 3518 of the Code.

In order that you may have a full and clear view of the law on the subject here involved as laid down by the Court of Appeals of Kentucky in the case above referred to, I quote at length from the opinion in that case as follows:

> "Therefore, when deposits are received, the bank becomes a debtor to the depositor for the amount of the deposit, and, if it agrees to pay interest, for that also. These are the only terms and conditions regulating deposits and the payment of interest, and if, in addition to this, the bank may pledge its assets to the depositor, then it may exercise another most extraordinary power, which is not conferred by Article 2, and not necessary for the conduct of its business of "receiving deposits and paying interest thereon." It would be a dangerous implication to deduce from the words of the statute, which should rather be construed strictly, for the benefit of the stockholders and protection of the depositors. The exercise of such a power is therefore clearly beyond the terms of the law, or any reasonable or necessary implication which the court would be authorized to deduce from the language of the statute, and would tend to lessen the usefulness of banks as great public institutions by destroying public confidence in them. Such a practice, if indulged and authorized, might work great injustices and inflict financial loss, not only upon the depositors, but upon the stockholders as well. Large depositors, if secured, might absorb the greater part of the assets of the bank, and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law contemplates, and was evidently

framed to insure fair and uniform dealings by the banks with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference. Public policy will not, therefore, tolerate a practice which might, sooner or later, in the event of financial trouble with the bank, enable it to pay and protect the favored few at the expense of the equally deserving many. If the fact was known that a bank had secured one or more of its depositors, and left the others unsecured, no prudent person would deposit with it. No bank would advertise that it engaged in such a practice, because depositors who were not provided for would be driven away. The very fact that the transaction is one that will not stand the test of publicity is a strong argument against its legality, as well as its necessity. Banks publish statements of their assets, and individuals deposit on the faith of these published statements. It is well known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits, when its assets were secretly pledged.

* * * * * * * * * * *

"Counsel for appellee also cites and relies upon Bolles on Modern Law of Banking, p. 479, Morse on Banking, 4th ed, Section 47, and Pratt's Digest of National Banking Laws, p. 11, to the effect that among the implied powers of a bank is that to secure deposits. This statement of the law is not elaborated upon by any one of the authors, and we are constrained to believe and hold that the authors used this expression in its limited sense, and that it was meant to apply to that class of cases, where, by express statute, a particular deposit was to be secured before it could be placed in bank. Under such circumstances, the bank, before receiving it, would necessarily have the right

to execute the bond, but this would not, by any means, justify the claim that the bank had the right to secure other deposits simply because it had the right to secure a particular deposit which the law expressly required to be secured before it could be deposited. But, whatever meaning these distinguished authors may have intended should be given the statement referred to, we are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors. There being no express authority given to a bank to secure a deposit by pledge of its assets, and it being apparent that such a practice would have a tendency, and pave the way, to the perpetration of fraud by putting it in the power of the officers of a bank to give a preference to favored customers, it cannot successfully be maintained that a bank has the implied right or power to do so. Banks undoubtedly have the right to do many acts and things not expressly authorized by their charters, or specifically designated in the general laws adopted for their organization, reglation and government. These are termed implied powers, but such powers are those found necessary to enable the banks properly and expeditiously to carry out and enjoy the powers, rights, and privileges expressly given them. Before a bank should be adjudged entitled to exercise any power not expressly given, it should be clearly established that such power is essential to the proper conduct of its business, and necessary to enable it properly to enjoy, use and carry out its express powers. When such test is applied to the claim of right, on the part of a bank, to prefer one of its depositors over another, it is apparent that the right should be denied. The exercise of such a power would necessarily be fraught with great possibilities for the perpetration of fraud, and would undoubtedly have a tendency to destroy the faith of the depositing public in banking institutions.

"When a legislative act is susceptible of a dual construction, one of which secures equality and equity, and the other paves the way to the perpetration of fraud, no court would hesitate to adopt that construction in-

suring fair dealing. So, likewise, when it is a question as to whether or not a bank has the implied power to secure one depositor at the expense of the others, the effect of the exercise of such power is a proper subject of inquiry; and when we find that the exercise of such power would enable the bank, or at least put it in its power, to perpetrate a fraud upon some of its depositors, we unhesitatingly hold that the exercise of such a power is not necessary to the proper enjoyment of its charter or statutory privileges, and, hence, that it has not such implied power; and its attempt to exercise it is an act *ultra vires* and void. In taking this position we are aware that cases are to be found where courts have recognized this right in banks but upon examination we find that there was express statutory authority authorizing it; and, of course where authority is expressly given to a bank to secure certain deposits, the bank in so doing is acting, not beyond, but clearly within its legal rights; but we have found no case where it has been held that a bank, in the absence of some statutory authority, had the right to secure, by secret pledge of its assets, one depositor at the expense of the others, and thereby deprive the latter class of their proper distributable share of the assets of the bank in the event of its insolvency. The rigid enforcement of this principle will not deprive banks of the right to exercise any of their legitimate functions, but, on the contrary, will build them up in the confidence of the depositing public; for, when depositors know that the bank not only may, but must, deal fairly with them, banks will take that position in the confidence of the public in which these great institutions deserve to be held.

"The aim and trend of all modern legislation on the subject of banks has been to protect the depositor. The law imposing double liability upon stockholders, that making provision for the publication of sworn statements as to the bank's condition at regular intervals, and, lastly, that providing for a rigid examination and inspection by competent men,—all look primarily to the protection of the depositor. The law makes ample provision for the protection and security of all depos-

itors. They have not only all of the assets of the bank for their security, but, in addition, each stockholder is liable for double the par value of his stock, and he may be required to contribute, to this extent if necessary, to protect the depositors. No system has been invented and no scheme has ever been suggested that would more equitably and fairly protect the depositors. If banks are made to observe strictly the law, and not allowed to divert their assets from their proper and legitimate channel, it will be in rare instances indeed that depositors will feel the need of special security for their funds when placed in banks. Sound business banking principles demand that no bank should be permitted, under any circumstances, to secure any depositor by a pledge of its assets. But where, by charter provision or statute, a bank is required to secure a state, county, court, or other deposit before it can receive such deposit, the security which the bank gives must be such as it can procure by personal indorsement or otherwise, which does not involve a pledge of its assets. For many years the state officials have placed such a construction upon the law requiring state depositors to give security before they can receive any part of the state's money.

"The assets of these state depositories have never been pledged as security for state deposits, but the state has invariably received as security for its deposits the indorsement of individuals or solvent bonding companies. This is undoubtedly the character of security which the legislature contemplated should be given, when it enacted Section 4693, Kentucky Statutes, requiring state depositors to give security for the public funds, and Sections 411 and 2903, requiring depositors for chancery court and city funds to give security for their safekeeping and payment. We are not advised as to the interpretation which court officers and city officials have placed upon the sections of the statutes quoted, but as the giving of personal security for the safety and return of such public deposits as are required by law to be secured would fully meet the ends of the law, and in no wise impair the value of the bank's assets as security for all of its depositors,

it is apparent that this is the character of security contemplated. That this was the legislative intent is made the more apparent, when it is remembered that all of the assets of the bank stand pledged to secure all of its deposits, and it cannot be that the legislature intended that this security for all of the deposits should be impaired in order that a few, or any number less than all, might be the better secured. In other words, the legislature evidently did not intend that the security of any depositor should be impaired, in order that that of another might be increased. So the only reasonable construction that can be placed upon these statutes requiring certain public funds to be secured by the depository is that the security that such depository shall give must be other than a pledge of its own assets.

"There is no statute requiring the deposits of the county treasurer to be secured by the depository, and there is no express power under which the bank was authorized to secure him by a pledge of its assets; no necessity existed for its doing so, in order to enable it properly to conduct its business as a banking institution; hence, its attempt to do so was an act *ultra vires* and void."

Being of the opinion that the case above mentioned correctly states the law on the question here involved, it is my judgment that no State bank has the legal right either to pledge its assets to protect certain depositors or to deposit its assets with a surety company as collateral to protect such surety company in the execution of a bond designed to indemnify certain depositors unless there be express statutory authority therefor. I can readily see why the statute above referred to making provisions for depository of state funds is sustainable in the theory that state funds are the property of all the people in the State, and that protection is provided for a sovereign or State which makes provision for the banking needs of the people in the State by authorizing the incorporation of banks.

I regret that it has been necessary to extend this letter to the length which I have gone but the subject has impressed me as being a very important one as to which you would wish to have the fullest information possible.

If after reading the foregoing opinion you should desire any further information in connection with it I shall be pleased to have you advise me.

Very truly yours,
LAMAR FIELD,
Assistant Attorney General.

TAXATION:—State has lien on real estate for franchise taxes; after foreclosure of mortgage, no taxes becoming due by mortgagor constitute lien until he redeems.

April 5, 1922.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

My Dear Sir:

In re: Lien of the state for franchise taxes.

Your letter of March 30, 1922, to Hon. Harwell G. Davis, Attorney General, has been referred by him to me for answer.

It is my opinion that the lien of the State as for franchise taxes extends to real estate as well as to personal property, notwithstanding Section 368 of the Revenue Act of 1919. I cannot believe that it was the object or purpose of the Legislature in enacting Section 368 of the Revenue Law to repeal all other laws which created and conferred a lien in favor of the State upon real estate as for franchise, license or privilege taxes. It is true that this section does not confer or give a lien upon real estate; but Section 416 of the Revenue Act does confer a lien upon all property, real or personal, which may be assessed against the person. This Section, 416 of the Revenue Act, is but a reproduction of Section 2093 of the Code, and of its antecedents in former Codes, which in my opinion extends the lien of the State as for franchise, privilege, or license taxes to the real estate of the owner as well as to the personal property. As before stated, I cannot believe that it was the intention of the legislature in enacting Section 368 to either repeal or limit the operation or effect of Section 416 of the same Revenue Act, or of Section 2093 of the Code.

Question 2 as to effect of mortgages upon lien for taxes.

Ordinary mortgages are not such an alienation of property by the mortgagor as to exempt it from liability as for his taxes after the execution of the mortgage. As between the mortgagor and all the world, except the mortgagee, the mortgagor is the owner of the property and entitled to the possession and control thereof until the law day of the mortgage, even as against the mortgagee; and is so entitled to the possession and control against the world, except the mortgagee, even after the law day. In equity a mortgage is but a security for a debt, and does not pass the fee to the mortgagee.

A foreclosure of a mortgage, however, in a court of equity or under the power thereof cuts off or extinguishes the mortgagor's legal and equitable title to the property; and after such foreclosure it would not be liable to the mortgager's taxes thereafter accruing unless and until he should redeem by exercising his statutory right of redemption. If he should redeem, the title to the property would reinvest in him; and thereafter, of course, it would be subject to his taxes as if there had never been a foreclosure or redemption. Taxes accruing against a mortgagor after a foreclosure and before a redemption would not be a charge or a lien upon the property sold under the foreclosure sale, if there should be no redemption by the mortgagor. Taxes, however, may accrue against a mortgagor which would constitute a lien upon the mortgaged property before the foreclosure; and, of course, a purchaser of the property at the foreclosure sale would acquire the property subject to the liens for taxes which had theretofore accrued against the mortgagor. But, as before stated, the property would not be subject to a lien as for taxes which had accrued against the mortgagor after the foreclosure sale.

Our statutes conferring the statutory right of redemption upon the mortgagor, confer a mere license or privilege which the mortgagor may exercise or not at his pleasure. This statutory right of redemption is not property, the subject of taxation. It is not alienable nor descendible, except for the purpose and in the manner provided by the statute.

Section 214 of the Revenue Act only contemplates the sale of property which has been assessed either against a known or an unknown owner; and this section expressly provides that the tax collector shall describe the property "in the

same manner as it is described in the assessment list." While, of course, the quoted provision would be subject to a reasonable construction, yet, the court would not construe it so as to include property which had not really been assessed.

The State, of course, has a lien upon all the property owned by a taxpayer as for the payment of all his taxes whether the property is assessed or not assessed. If the State should seek to enforce its lien for taxes against property which had not been assessed, it would be necessary to enforce the lien by an action or suit as other liens are enforced. Section 4829 of the Code is an express statutory provision to meet cases where the mode or remedy may be doubtful as for the enforcement of such lien.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

TAXATION:—Collection of taxes from bankrupt before and after adjudication.

April 5, 1922.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

My Dear Sir:

In Re: Taxation W. A. Handley Manufacturing Company, Randolph County.

Your inquiry of April 1, 1922, to Hon. Harwell G. Davis, Attorney General, has been referred to me by the Attorney General for answer. You are advised to instruct the tax collector to proceed with the collection of the taxes of the W. A. Handley Manufacturing Company just as if there had been no bankruptcy proceeding.

The mere filing of an involuntary petition in bankruptcy court does not deprive the claimed bankrupt of either possession or control of his property, nor does it prevent the state, county or municipality from proceeding to collect the taxes due from such claimed bankrupt in the same manner as if no petition had been filed. Whenever the court shall

adjudicate and decree the alleged bankrupt to be in law a bankrupt and appoints a trustee or receiver, then of course, the possession and control of the property would pass to the receiver or to the trustee in bankrupty; but until there is an adjudication of bankruptcy, and until a receiver or trustee is appointed, the state, county, or municipality proceeds to collect the taxes as if no proceeding had been instituted.

When, however, there is an adjudication of bankruptcy and a trustee appointed, the bankruptcy law directs that the trustee shall "pay all taxes legally due and owing by the bankrupt." (Bankruptcy Act, 1898, Sec. 64a.)

A state need not prove its claim in bankruptcy in order to recover taxes due to it on property of the bankrupt. All claims for taxes due are entitled to priority over all other claims, even over the trustee's commission and necessary expenses.

Black on Bankruptcy, Sec. 621; 159 Fed., 295; 20 Am. Bankruptcy Rep. 247.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

COSTS:—Solicitors' fees in recorder's court of Mobile.

April 11, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

You have referred to this office for answer the letter of W. L. Malcomb, Assistant Examiner of Accounts, with reference to the proper fees to be charged and collected in the recorder's court in the City of Mobile since 1911.

By a local act of 1911, Local Acts 1911 page 17, the office of assistant solicitor for Mobile County was created and the assistant solicitor was charged with the duty of attending the recorder's court of the City of Mobile and upon each conviction or appeal in the recorder's court where the state was represented by the said assistant solicitor a solicitor's fee of three dollars was taxed against the defendant.

"Said fees when collected shall be paid over to the county treasurer of Mobile County and by him deposited as a part of the general fund of said county."

By a local act approved September 4, 1915, Local Acts 1915, page 305, it was provided that the assistant solicitor should be appointed by the Governor and a general act of 1915 approved September 25, Acts 1915, page 822, provided that the local act creating the position of assistant solicitor in any county composing a judical circuit with three circuit judges should not be repealed or altered, except that twelve hundred dollars of the annual salary of the assistant solicitor should be paid by the State and the remainder by the county. In 1919 by an act approved August 5, the local act creating the assistant solicitor of Mobile County, and fixing his fee in the recorder's court at three dollars, was repealed, and the solicitor in counties composing a judical circuit with three circuit judges, was given the power to appoint an assistant solicitor to "represent the state in all cases in the inferior courts, in all preliminary proceedings, application for bail, and *habeas corpus* proceedings in all courts." No schedule of fees for such assistant solicitors was enacted in the repealing act of 1919, above referred to. Acts 1919 page 189.

The evident intention of the Legislature of 1919 with reference to the fees of assistant solicitors in counties composing a judicial circuit with three circuit judges was to levy no fees in the name of the assistant solicitor as such, but to place the matter of solicitors' fees in such counties under the control of the general law as to solicitor's fees. That is, the work of the solicitor's office was to be done by the solicitor or the assistant solicitor who represented him, and the proper fees pertaining to the solicitors' office should be collected in any court no matter whether the services were rendered by the solicitor or the assistant solicitor. The schedule of fees pertaining in Mobile County after August 5, 1919 is therefore that laid down in the General Act of 1915, page 817.

Section 7 of that Act reads as follows:

"For every conviction of misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into

the county treasury the same solicitor's fees provided for convictions in such cases in the circuit court; and on appeal to the circuit court, the same shall be taxed as a part of the costs in addition to the solicitors' fee taxed for such conviction in the circuit court, and this solicitors' fee previously taxed in the county court or inferior court, shall be paid when collected into the county treasury."

From this Legislative history it appears that in the recorder's court of Mobile County a fee of three dollars for each conviction or appeal should be collected by the clerk as a solictor's fee until August 5, 1919, after which time the same fees as are charged or collected in the circuit court should be taxed and collected in the recorder's court.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Duty of county to secure right of way, by condemnation if necessary.

April 12, 1922.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Alabama,

My Dear Sir:

Answering your letter of the 2d instant relative to the condemnation of rights of way for public roads constructed under the provisions of what is known as the Highway Act approved October 31, 1921, I beg to advise as follows:

Section 16 of the Act (Acts Special Session 1921, page 61) provides that:

"The rights of way deemed necessary by the State Highway Department for a road or bridge constructed under the provisions of this act shall be acquired by the county in which such road is to be located without expense to the state."

This provison makes it the duty of the county and not the State to acquire the rights of way deemed necessary by the State Highway Department.

Section 5 of what is known as the Goode Act (Acts 1915 page 574) provides:

> "That the Boards of Revenue, Courts of County Commissioners, and other like governing body of the several counties of this state are herby given the right of eminent domain for the purpose of establishing and changing of public roads, bridges, and ferries in their respective counties."

This provision is still in effect and gives the counties all power of eminent domain necessary to comply with that provision of the 1921 Highway Act which requires the county to acquire the necessary rights of way.

In my opinion it is the duty of the county through its Board of Revenue, Court of Commissioners, or like governing body to acquire the necessary rights of way, and if such rights of way cannot otherwise be acquired the county should institute proceedings for the purpose of condemning the same.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

COAL AND IRON ORE TONNAGE TAX:—Due for month of October, 1919.

April 13, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

You state that a corporation engaged in mining coal and iron ore in this State paid the license or privilege tax levied under schedules 66 and 67 of the Revenue Act of 1919 (Acts 1919, page 419) for the privilege of operating its mines during November, 1919, the amount of such privilege tax being based upon and determined by the number of tons mined during the month of October, 1919. This corporation has not however, paid the privilege tax for mining coal and iron ore during the month of October, 1919. You wish

to be advised whether or not the license or privilege tax is due for the privilege of operating during the month of October, 1919, and if so upon what basis the amount of the tax should be calculated.

In reply I beg to advise that the Revenue Act of 1919 of which schedules 66 and 67 are a part, was approved on the 15th day of September, 1919, to go into effect upon the first day of October, 1919. See Section 425 Acts 1919, page 450. The privilege tax is therefore due for the month of October, 1919. To my mind there is no difficulty presented by the fact that the number of tons mined in the previous month, namely, September, 1919, is made the basis for calculating the tax for October, 1919, although no privilege tax was levied for the month during which it was mined. The Legislature may, in its wide discretion as to the methods of calculating the amount due as privilege taxes, use any convenient yard stick which bears a reasonable relation to the tax levied and which is not discriminatory.

Republic Iron & Steel Co. v. State, 204 Ala., 469.

I therefore advise you that the tonnage tax is due for the month of October and that it should be calculated upon the basis of the ore mined during September, 1919.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General,

AUTOMOBILE TAGS:—License inspector not entitled to fee on penalty imposed for using imitation or substitute tags.

April 13, 1922.

Hon. A. H. Shepperd, Clerk,
County Court.
Anniston, Alabama.

My Dear Sir:

You request to be advised whether or not the license inspector is entitled to fifteen per cent of the penalty imposed in the case where a person is convicted for using upon his car a tag in imitation of or substitution for real tags lawfully issued for such motor vehicles.

Schedule 9 of section 361 of the 1919 Revenue Act provides, among other things, that

> "It shall be unlawful for any person to use upon his car any tag in imitation of or substitution for real tags lawfully issued. It shall be the duty of sheriffs, police officers, or license inspectors to arrest persons violating this provision and a fine not exceeding fifty dollars may be imposed for each offence." (Acts 1919 page 399.)

This section does not provide for the payment to the license inspector of any part of the penalty imposed for the violation of this provision. His only right and authority is that of a police officer to arrest persons violating this provision of the law. The only provision authorizing the license inspector to obtain a part of a penalty imposed for the violation of a criminal provision of said revenue law, is found in Section 366 thereof (Acts 1919, page 442), which reads as follows:

> "For performing the duties required by this section the license inspector * * * if a criminal prosecution shall be commenced—shall be paid fifteen per cent of the penalty hereinafter prescribed in such case."

It will be noted that the fifteen per cent of the penalty which the license inspector is entitled to be paid is limited to the penalty prescribed by said Section 366 and for performing duties required by that section. It is a well recognized rule of construction that the law of costs and fees shall be strictly construed and that no one is entitled to collect the same unless it is clearly and definitely given by the law.

In my opinion the license inspector is not entitled to collect fifteen per cent of a penalty imposed for the violation of that provision which makes it unlawful for any person to use upon his car any tag in imitation of or substitution for any tags lawfully issued.

Yours very truly,

HARWELL G. DAVIS,
Attorney General.

QUARANTINE OFFICER:—Salary is preferred claim against county.

April 13, 1922.

Dr. S. W. Welch,
State Health Officer,
Montgomery, Alabama.

My Dear Sir:

Dr. H. G. Perry, State Registrar, requested this office to advise him whether or not the salary of a county quarantine officer is a preferred claim of the second class within the meaning of the decision rendered in the case of Brown, Treasurer, v. Gay-Padgett Hdw. Co., 188 Alabama, 423, 66 South 161.

The Supreme Court held in that case so far as is pertinent to this question as follows:

> "Legitimate county debts or obligations are of two classes: (1) Those which are prescribed and imposed by law, and are purely involuntary as to the county; (2) those which are merely authorized by law, and are assumed by the county with some measure of discretion, at least as to time and amount.
>
> "Section 153 of the Code makes a number of specified county obligations preferred claims against the general treasury, and requires the treasurer to set aside sufficient funds for their payment. We think also that, by necessary implication, whenever the assessed revenues of an overburdened county are not sufficient for the payment of all current county obligations, those involuntary obligations which are fixed and imposed by law, must be regarded as preferred claims of a second class, which are entitled to precedence over the general and voluntary obligations of the county."

Section 12 of the act revising the health and quarantine laws of the state approved September 29, 1919 (Acts 1919, page 916) provides that there shall be in each county having no health officer, a quarantine officer, and that his salary shall be fixed at not exceeding twenty-five dollars per month by the court of county commissioners or other body with like jurisdiction and that such salary shall be paid in monthly installments from the county treasury as in the case of other

salaries paid by the county. This provision imposes by law upon the county, the salary of such quarantine officer.

In my opinion it is purly involuntary as to the county and should be regarded as a preferred claim of the second class and entitled to precedence over general and voluntary obligations of the county.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

CORPORATIONS:—Filing or recording fees for non-business corporations.

April 13, 1922.

Hon. W. W. Brandon,
Judge of Probate,
Tuscaloosa, Alabama.

My Dear Sir:

You have inquired what fees must be collected by the judge of probate upon the filing and recording of documents incorporating an educational, social or benevolent corporation, and particularly whether or not the charter fee provided by Section 3450 of the Code of 1907 should be paid by such a corporation. In reply I beg to advise you as follows:

Corporations of a business character are organized under Sections 3445 to 3501 of the Code of 1907 and certain amendments thereto. Corporations of a religious, educational, benevolent or social character are organized under Sections 3613 to 3626 of the Code of 1907 and the various amendments thereto. These different statutory schemes of organization were enacted by the Legislature at different times; that relating to eleemosynary institutions being very old and dating as far back as the Code of 1852, while that pertaining to business corporations is a direct product of the Constitution of 1901, and was enacted during October, 1903. The two systems are therefore entirely separate and the provisions of one cannot be read into or construed as a part of the other.

This being true none of the fees for filing and recording, nor, specifically, the charter fee mentioned in Section 3450, can be construed as a part of the legislation with reference

to the organization of eleemosynary institutions, and the authorization for the collection of such fees must, if it exists at all, be found in some other provision of the law.

The Sections of the Code of 1907 relating to the organization of eleemosynary institutions have been frequently amended. See Acts 1909, Special Session, page 107, Acts 1911, page 145, Acts 1915, page 874, Acts 1919, pages 117 and 826. In none of these amendments, however, is any recording, filing, certificating or charter fee levied on the incorporators of eleemosynary corporations. The law of fees is universally construed as being penal and as you know, specific authority for the collection of any fee must be found in the statutes before such fee is due and payable.

I therefore advise you that upon the incorporation of a social, benevolent or educational order not of a business character, no filing, recording, certificating or charter fee is due or collectible.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

HIGHWAY COMMISSION:—Traveling expenses of members paid by State only when incurred in discharge of official duties.

April 14, 1922.

Hon. W. S. Keller,
State Highway Engneer,
Montgomery, Alabama.

My Dear Sir:

Your letter of the 14th of last month contains the following two inquiries, to wit:

First: Can the State Highway Commission by virtue of the provisions of Section 2 of what is commonly known as the State Highway Law determine the conduct of the State Highway Department and the performance of its duties, and under such authority, can the Commission promulgate rules and regulations governing the official duties of the members of the State Highway Commission?

Second: Is a member of the State Highway Commission entitled to receive the necessary traveling expenses incurred in attending a meeting of citizens of the state to which he has been invited for the purpose of giving in-

formation concerning the work of the State Highway Department, its plans for future work, and the location of roads?

These inquiries will be considered in the order numbered.

First: Section 2 of the Highway Act (Acts Special Session 1921, page 55) so far as pertinent to this inquiry provides that

> "The State Highway Commission shall consider and determine all questions relating to the general policy of the State Highway Department and the conduct of its work and in the performance of its duties."

While this provision empowers the commission to determine questions relating to the general policy of the State Highway Department in the conduct of its work and the performance of its duties, yet the provision does not delegate to the commission the authority to create duties not provided by law. The State Highway Commission is an administrative, and not a legislative, body. Like all bodies created by statute the Commission has no power except that which the Legislature expressly bestows.

> Railroad Commission v. Alabama Northern Railway, 182 Ala., 357; 62 South. 749.
> N. C. & St. L. Railroad v. State, 137 Ala. 439; 34 South. 401.

The powers conferred upon the Commission by the statute creating it cannot be diminished or increased except by legislative enactment, even though experience convinces the Commission beyond all reasonable doubt that the exercise of powers not given by the law are necessary to the satisfactory conduct of the department and the accomplishment of its work. In other words, the Legislature, and not the Commission, determines what powers the Commission shall and shall not exercise.

The provisions under consideration must be construed as authorizing the State Highway Commission to determine the method by which the affairs of the department are to be administered, to determine the general principles by which the department is to be guided, and to promulgate rules which it deems most conducive to the discharge of the work required of the department.

This provision cannot be construed as authorizing the State Highway Commisson to create new duties or exercise powers not provided by the statute.

Second: In construing provisions of law providing for the use of public funds, the universal rule requires that such provisions be given a strict construction.

> "The law is and should be extremely careful, watchful and exacting of public officers where public funds are involved."

Mobile County v. Williams, 180 Ala. 639; 61 So. 963.

Where a payment is claimed from public funds by an officer such payment is collectible only when the payment is *expressly authorized* and *expressly imposed* by statute, and such payment cannot rest on *implication.*

Smith, Auditor, v. Bowers, Tax Collector, 187 Ala. 606; 65 So. 819.

That part of Section 1 of the Highway Act which provides for the payment of the expenses of a member of the Highway Commission is as follows:

> "The members of the commission shall serve without compensation and each shall receive and be allowed traveling and other expenses incurred by him in the discharge of his official duties."

It will be noted that the traveling expenses which a member of the commission is entitled to receive are such expenses as are necessarily incurred in the discharge of *an official duty.*

Under the rule of strict construction, it is not permissible to include in the meaning of the term "official duties," any act which by implication might be considered by some as being an official duty, but the meaning of the term must be limited to those duties which are imposed by the law and which the law requires such officer to perform.

People v. Hoffman, 116 Ill. 587; 5 N. E. 596.

The performance of an act not required or expressly authorized by law although such act is closely related to the duties the law imposes on the officer, and even though such

act promotes the accomplishment of the work which the law requires of such officer, cannot be classed as an official act or the discharge of an official duty.

Hatch v. Board of Supervisors of Calhoun County, 170 Mich. 322; 136 N. W. 350.

An examination of the Highway Act fails to disclose any provision which requires or authorized any member of the State Highway Department to receive necessary traveling expenses incurred in attending a meeting of citizens for the purpose of giving such citizens information concerning the work of the State Highway Department, its plans for future work, and the reasons prompting its official acts. Citizens who desire information relative to the conduct of any department of the State or the expenditure of public funds, have a right to investigate the records and reports which the law requires the department to make for that purpose.

No official duty rests on any member of the State Highway Commission to attend meetings of citizens in the different sections of the State for the purpose of personally advising them of the contents of such records or explaining to them the future plans of the State Highway Department.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

REGISTRATION OF ELECTORS:—Poll tax due before February 1st succeeding from persons becoming 21 before October 1st.

April 14, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

The Hon. W. E. Torbett, Judge of Probate of Hale County, states that a number of persons in that county who became twenty-one years of age before the 1st day of October, 1921, and who failed to pay poll tax before February 1, 1922, are demanding that their names be placed upon the list of qualified voters, claiming that they are not required to pay

poll tax before October 1, 1922, and that their poll tax will not be delinquent before October 1, 1923. You wish to be advised whether or not the names of such persons should be placed upon the list of qualified voters.

In reply I beg to advise you that in my opinion such persons not having paid poll tax previous to February 1, 1922, are not entitled to have their names placed on the list of qualified voters. Section 194 of the Constitution of 1901 explicitly provides that:

> "Poll tax shall become due and payable upon the first day of October in each year and become delinquent on the 1st day of the next succeeding February."

The new registration law (Acts Special Session 1920, p. 124) provides for registration between January 1st and April 1st, 1922.

There is ample opportunity for persons becoming twenty-one years of age previous to October 1, 1921, to register in the first month of 1922, pay their poll tax previous to February 1st, and thereby to secure the right to be placed on the list of qualified voters which is to be published April 15, 1922. The language of the statute and the Constitution is clear and explicit, and I see no grounds for such an interpretation as has been suggested.

It occurs to me, however, that if any of the persons mentioned have rendered honorable service in the naval or military services of the United States within the meaning of Section 194½ of the Constitution as amended, that these ex-service persons upon the filing of the claim for their exemption will be entitled to have their names placed upon the list of qualifed voters, provided, of course, that they are duly registered by the Board of Registrars. Section 194½ by its terms is retroactive and the persons who are entitled to the benefits of that section may secure them now even though the time for paying poll tax, namely, February 1st, has passed.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

CONVICTS:—Return to county of conviction by payment of transportation sufficient.

April 28, 1922.

Hon. William F. Feagin,
State Warden General,
Capitol.

My Dear Sir:

This office is in receipt of your inquiry whether under the law regulating the discharge of convicts it is necessary that they should be returned to the county seat of the county in which they were convicted under custody of a guard, or whether the payment to them of money for transportation to such county seat is a compliance with the law.

The law with reference to this matter has been placed in great confusion by various amending and conflicting laws passed at the time when the Code of Alabama of 1907 was in the course of publication.

By Section 6602 of the Code of 1907 as adopted on July 27, 1907, General Acts of 1907, page 499, it was provided:

> "It shall be the duty of any person who has in his possession or under his control, any state or county convict, to discharge such convict at the expiration of his term of penal servitude, and to furnish him with transportation to the county seat of the county in which such convict was sentenced to imprisonment. And he shall also furnish to such convict one good suit of clothes and fifty cents a day for each estimated day's travel from the place where he is discharged to his destination, and one hat and pair of shoes. But if such convict be charged with the commission any other criminal offense he must be delivered to the proper sheriff or officer, to answer such charge, under such rules and regulations as may be prescribed by the board of inspectors."

It will be noted that this section treats the matter of the discharge of State as well as county convicts, although it appears in the Code under a chapter devoted to county convicts. However, no question as to the validity of this section can properly be raised as Section 45 of the Constitution

does not apply to "bills adopting a code, digest or revision of statutes."

Bluthenthal v. Trager & Co., 131 Ala. 639.

The special session of the Legislature of 1907 again took up the matter of the discharge of state and county convicts, and made lengthy provision therefor in Section 25 of an Act approved November 30, 1907 (Acts 1907 Special Session, page 179). Among other provisions this Section 25 requires that convicts confined in counties having more than one hundred thousand population should at any time within fifteen days prior to the time of their discharge, be transported to the counties in which such convicts were convicted. This section of the Act was and is in my opinion unconstitutional, because it seeks to regulate the discharge of state as well as county convicts, whereas the title of the Act reads as follows: "To provide for the hire, management, control and inspection of county convicts."

See Constitution of 1901, Section 45.
Dowling v. City of Troy, 173 Ala, 468; 56 So. 118.

The Legislature of 1909 readopted the whole Code of 1907 but specificially provided:

> "That all acts of the Legislature passed at the special session of the Legislature altering, amending or repealing either the sections of the Code or the Acts of the Legislature passed at the general or special session are unaffected by the adoption of this Code."

The intention of the Legislature of 1909 seems to have been that the Code as written by the Code Commissioner should stand adopted, but that amendatory acts passed by the Legislature subsequent to its adoption should also remain effective as amendments to the Code. There is nothing, however, in this Act which would cure the defect in the title of the Act of the special session of 1907 so far as Section 25 relating to the discharge of state convicts is concerned.

In 1919 the Legislature reenacted Section 6602 of the Code of 1907 *ipsissimis verbis*. It was reenacted, however, as an amendment to Section 25 of the Act of the special session of 1907.

Acts 1919, page 836.

Since this section as originally passed was obnoxious to Section 45 of the Constitution as previously pointed out, the amendment was also obnoxious and the legislation is still invalid, under familiar principles of statutory construction.

The net result of this legislation is to leave Section 6602 as it now appears in the Code of 1907 the controlling provision upon the subject of the discharge of state and county convicts. There is no requirement in that section that a guard be furnished to take the prisoner to the county seat of the county in which he was convicted, and the payment of proper transportation charges with the usual allowances seems to be a full compliance with the law.

This opinion is written after consultation with Judge James J. Mayfield, who was the Code Commissioner of 1907, and additional weight is given it by the opinion of the Court of Appeals in the case of *ex parte* King 75 So. 710, in which, during the year of 1917, Section 6602 of the Code of 1907, was regarded as controlling upon the subject of the discharge of convicts.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

RURAL SCHOOLS:—State aid not available to cancel old indebtedness.

April 29, 1922.

Hon. John W. Abercrombie,
State Superintendent of Education,
Capitol.

Dear Sir:

Your inquiry of April 8, 1922, with reference to state aid for the school at McKenzie, Butler County, Alabama, presents the question whether or not under Article 18 of the School Code, Acts 1919, page 625, as amended in 1920, Acts 1920, page 113, you as State Superintendent of Education, have the authority to approve an application for state aid to be used in meeting an indebtedness existing upon a school house built during the year 1917.

In reply I beg to advise you that the School Code of 1919 is a redrafting and reorganization of the whole system of education in Alabama, and that it supersedes all previous legislation on the subject. The rural school house fund previously created by the Code of 1907 (Secs. 1975 to 1993) as amended in 1915 (Acts 1915, page 697) and in 1919 (Acts 1919, page 106) was consolidated and all unexpended balances thereof as of date of October 1, 1919, were placed in a fund "for the erection of rural school houses," and an annual appropriation of eighty-seven thousand five hundred dollars ($87,500.00) was added thereto. It was further provided that on the first day of October, 1920, and annually thereafter the total of any unexpended balances should be reapportioned among the counties of the State.

The moneys thus placed at the disposal of the State Superintendent of Education were required to be distributed for "proposed" or future school buildings in rural communities. (Section 3, Article 18, School Code.) Acts 1919, page 625. A careful reading of Article 18 and especially of Sections 3 and 4 will show the very clear intention of the Legislature to appropriate money for future improvements in the school buildings and equipment of the rural communities of the state; standardized plans are provided for, standardized maximum costs, standardized ownership, control and superintendence are provided. A redistribution at the end of each year is called for, thus clearly evincing the intention that each year of school building should be an administrative unit—a time for marking progress done and making new plans for the future.

I therefore advise you that as Superintendent of Education of Alabama you are without authority to expend the rural school fund for past improvements or for paying off debts incurred in making past improvements.

Yours very truly,

MARION RUSHTON,

Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Local laws are determined by political and not geographical divisions of State.

May 1, 1922.

Mr. I. T. Quinn,
Commissioner of Conservation,
Capitol.

My Dear Sir:

In reply to your inquiry of April 21, 1922, as to whether or not the Statute approved August 27, 1919 (Acts 1919, page 239), to make it unlawful to take fish from any of the waters of this State, or the tributaries of any of said waters, emptying into Choctawhatchee Bay, is a general or local law, has had my careful consideration. The statute in question is unique, in some respects it is *sui generis.*

The trouble or difficulty in answering your question arises from, or is due to, the fact that Section 110 of the Constitution, as you point out in your letter, attempts to define a general, local and a private statute or law. The case shows the unwisdom of attempting to convert a constitution into a dictionary or law lexicon. It is perfectly certain that the statute in question is not a general law under the definition found in Section 110 of the Constitution. It is equally certain that it is not a local law under the same section of the Constitution. It is equally certain that it is not a special or private law within the meaning of Section 110 of the Constitution. The statute in question not being a local, private, or special law, within the constitutional definitions, Sections 104, 105, and 106 of the Constitution, these sections do not apply to it, and this being true, we know of no inhibition or prohibition in the Constitution against its passage or enactment; and hence, it is our opinion that the statute is valid, in so far as these prohibitions of the Constitution are concerned, which require notice and publication as to the passage of local laws (Constitution of 1901, Sections 104 and 106).

We feel it our duty, however, to say to you that we are not surprised that the trial court should have held this law to be a local law. The Supreme Court itself has been very much perplexed and worried when construing and defining those laws which are local and which must be advertised. As stated before, this difficulty arises from the fact

that the Constitution undertook to define local laws, and we believe it is certain that the law in question is not a local law within the definition of Section 110 of the Constitution. The law in question does not in terms or by necessary implication refer to any *"political"* division or subdivision of the state. It applies of course to a topographical subdivision of the State, but not to a "political" division of the State; and, it seems that under the Constitution, in order for a law to be a local one, within the meaning of the Constitution as it deals with these classes of laws as general or local, the laws must be applicable or relate to a "political" division or subdivision of the State rather than a topographical or geographical or climatical division or subdivision of the State.

The Supreme Court has held that the Legislature might make reasonable classifications of law so that all of their provisions would not be required to apply to the whole State, and it would seem that the law in question was a classification which the Legislature was authorized to make, as the prohibition as to local laws is limited to "political" subdivisions of the State.

The law in question is also uncertain as to whether or not it applies to all the waters of this State; for example, the title of the bill is "to make it unlawful for any person to take or catch fish in any of the waters of this State," and also this same language is used in the first section of the Act. It is true that the succeeding phrases and clauses both in the title and body of the Act would seem to limit the law to the waters or tributaries of such waters which empty into Choctawhatchee Bay, but the first clause both in the title and the body of the Act, is broad enough to cover the entire State, and as the language is doubtful as to whether it applies to all waters of the State, the Court will be inclined to give it the construction which would uphold the statute, rather than one which would strike it down.

Very truly yours,
JAMES J. MAYFIELD,
Assistant Attorney General.

MOBILE COUNTY FINE AND FORFEITURE FUND:—Solicitor's fees for convicted insolvent defendant payable from general treasury of county into State treasury.

May 5, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

You request an opinion whether or not the county treasurer of Mobile County is authorized to pay out of the county treasury of Mobile, solicitors' fees in cases where the defendant has been convicted and executions have been returned "no property found."

By an act approved December 3, 1890, the fine and forfeiture fund in Mobile County was abolished and a special system for the payment of claims against such fund was established. Section 2 of that Act specificially provides:

> "Section 2. Be it further enacted: That all claims now existing or which may hereafter accrue that are by law charges against the fine and forfeiture fund of Mobile County, shall be paid out of the treasury of Mobile County." (Acts 1890-91, page 9.)

By Code Section 6634 it is provided that the fees of solicitors are to be taxed against the defendant on conviction and if he is insolvent, to be paid out of the fines and forfeitures in the county treasury. Section 6632 defines an insolvent defendant as one against whom an execution has been returned "no property found," such a return not to be made within less than thirty days from the time it goes into the hands of the sheriff. Section 7792 provides:

> "All fees which may be by law taxed as solicitors' fees against defendants on conviction secured by a solicitor who is paid a salary by the State belong to the State and when collected must be paid into the State treasury."

Under these provisions of the law, I am of the opinion that the county treasurer of Mobile County has ample authority to pay solicitors' fees against insolvent defendants

out of the general treasury of Mobile County into the State Treasury.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

CORPORATIONS:—Filing or recording fees for non-business corporations.

Hon. W. W. Brandon, May 8, 1922.
Judge of Probate,
Tuscaloosa, Alabama.

My Dear Sir:

I am informed that you interpret the opinion of this office rendered April 13, 1922, with reference to the fees required to be paid to the judge of probate for services in connection with the incorporation of eleemosynary institutions to mean that you are entitled to a fee of two dollars and fifty cents ($2.50) for examining the certificate under Section 3449 of the Code. In this you are, in my opinion, misinformed for the reason that Section 3449 is a part of the law with reference to business corporations and has no connection whatsoever with the law relating to eleemosynary corporations.

Since writing the opinion of April 13, 1922, above referred to, I have, however, discovered that a fee of two dollars ($2.00) is provided:

> "For filing and recording of certificates of incorporation of religious, educational, benevolent and burial societies."

An additional fee of twenty-five cents for each certificate without seal of office and fifty cents for each certificate with seal of office is also levied by the same Act of the Legislature (Acts 1911, pages 155, 157).

I was not aware of this legislative provision when I wrote the opinion above referred to and desire at this time to amend that opinion by adding that the probate judge is entitled to the filing, recording and certificating fees above referred to as set out in the Act of 1911.

Yours very truly,
MARION RUSHTON.
Assistant Attorney General.

PUBLIC HIGHWAYS:—Condemnation by county of right of way within corporate limits of town.

May 30, 1922.

Hon. W. S. Keller,
State Highway Engineer,
Bell Building,
Montgomery, Alabama.

My Dear Sir:

In a case arising in New Brockton, Coffee County, you wish to be advised whether or not the county has a right to condemn private property lying within the corporate limits of a town for road purposes.

In reply I beg to advise you that in my opinion the county's right to condemn private property for road purposes is not limited to property lying outside of the boundaries of incorporated towns, but extends to all property within the county.

Section 3860 of the Code confers the power of condemnation upon the county and the power there given is only limited by Section 3867 which provides that if the property sought to be condemned is already devoted to public use, it shall not be condemned to an additional public use unless there is an actual necessity for such additional public use and further the additional public use must not interfere with the public use to which the property is already subjected.

As I understand the facts of the present case, even this limitation does not apply because it is not stated that the land sought to be condemned belongs to the incorporated town, but simply that it lies within the boundaries of the town. In my opinion such private property lies within the county just as much as though it lay outside of the boundaries of the town, and is of course subject to the condemnation powers granted by Section 3860 of the Code and the numerous amendments thereto. If this were not so it is difficult to understand how a county could ever condemn a court house site within a town or indeed how the federal government could ever condemn a site for a post office.

I have great deference for the opinion of the counsel who advises otherwise, but I am unable to find in the statute any limitation of the county's power arising from such

facts as you state. The matter will be found discussed at length in 20 Corpus Juris, pages 587 to 619, inclusive

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

SCHOOL TAX ELECTIONS:—Voters in district election must be residents of district.

May 30, 1922.

Hon. Jno. W. Abercrombie,
State Superintendent of Education,
Capitol.

My Dear Sir:

You have referred to this office for answer the letter of Mr. P. A. McDaniel, Junior, Superintendent of Education of Barbour County, in which he inquires whether or not qualified electors who live outside of a rural school district but within the beat, part of which is contained in the school district, should be permitted to vote in a three mill district school tax election.

The answer to this question depends upon an interpretation of Section 9 of Article 12 of the School Code, Acts 1919, p. 613, which reads as follows:

> Section 9. "All persons who are at the time of such election qualified electors in the county where such an election is held, or in the beat or precinct comprising such rural or city school district where such election is held under the laws and Constitution of Alabama then in existence, shall be qualified electors to participate therein."

It seems obvious that only such persons as reside within a school district should vote upon the levy *vel non* of taxes within that district. The provisions of Section 1 requiring written notices of the election to be posted in three public places "within said district" and the very careful provision as to boundaries of school districts which may or may not coincide with beat or precinct lines as set out in Section 4, indicate such an intention on the part of the Legislature. It would certainly be extraordinary if the

Legislature had provided otherwise and very clear and unmistakable language would be required to arrive at the extraordinary result of permitting persons who do not live within a district to determine whether or not property within that district should be additionally taxed.

The question has not heretofore been raised so far as can be discovered from the indexes and citations on the subject. Many three mill district taxes have been levied and practically every conceivable objection to their validity has been urged, and it seems strange that this objection if sound or even plausible, should not have been raised heretofore. The language of Section 9 is not, it must be admitted, very clear. It does, however, speak of the qualification of electors in terms familiar to registrars and election officials; namely, qualifications by county and beat or precinct, and further requires that the beat or precinct shall comprise the rural or city school district. This is very far from saying that simply because part of the beat or precinct may be included within the school district, all qualified electors of the beat or precinct, even though they reside outside of the district, are authorized to vote within the district, and in my opinion no such extraordinary result can be reached from the language of the section.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

REGISTRATION OF ELECTORS:—No authority to open books after April 1st during year 1922.

May 31, 1922.

Hon. J. E. Kumpe,
Judge of Probate,
Moulton, Alabama.

My Dear Sir:

The joint letter of you and the Hon. F. O. Smith, Chairman of the Board of Registrars, dated May 28, 1922, contains the following inquiry:

"Would it be legal for the Court of Revenue, or in any way for the State department to allow the board

of registrars to meet one week before the election to register those who have become qualified to register since last registration?

The Act approved October 2, 1920, expressly repeals all previous laws governing the registration of electors in this State (sections 41 and 42 of Acts Special Session 1920, page 124). Sections 6 and 7 of this Act contain the only provisions governing the time of registering electors. Section 6 provides that:

> "The board of registrars in each county shall visit each precinct at least once and oftener if necessary, between January first and April first, 1922, and each two years thereafter, to make a *complete registration* of *all persons* entitled to register."

Section 7 provides that in addition to this regular registration period that:

> "The courts of county commissioners, boards of revenue or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of July, 1921, and each two years thereafter for the purpose of registering voters."

The regular period of registration is thus limited to a time between January 1st and April 1st, 1922, and each two years thereafter. No provision exists for special registration during the year 1922, as Section 7 limits the authority of a court of county commissioners in ordering registration books open during the month of July of the odd numbered years.

The 1915 Registration Law contained similar provisions limiting the registration to the period between November 15, 1915, and January 5, 1916, and each two years thereafter. Our Supreme Court in considering whether or not registrations made at any other time would be legal, held that the registration of a voter at any time except between November 15th and January 5th was forbidden. In that case it was said:

> "We cannot doubt that the intention of the Legislature was accurately expressed in the provision that all

registration shall be performed between November 15th and January 5th; and this language, of its own force, forbids registration after the latter date."

State ex rel. Shoemaker v. Davidson, 196 Ala. 453; 1 So. 678.

State ex rel. Newton v. Herring, 196 Ala. 455; 71 So. 679.

It follows from this construction of the Supreme Court that any registration made at any time during 1922, except during the period between January 1st and April 1st, would be illegal, and that the court of county commissioners or other court of like jurisdiction has no authority to provide for the opening of the books to register voters during the year 1922.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

PRIMARY ELECTIONS:—Appointment of election officers.

June 1, 1922.

Hon. H. F. Lee,
State Auditor,
Capitol.

My Dear Sir:

You request to be advised what persons are charged with the duty of appointing election officers to hold the primary August 8, 1922.

What is known as the Primary Law of 1915 provides that:

"Officials for each election district or precinct in all primary elections held under the provisions of this Act shall be of the same number as required and designated by law to hold regular state elections, and their duties and responsibilities shall be the same as those of legally appointed and regularly qualified like officers of regular elections, and said officers shall be appointed by the same appointing board as officers to hold regular state elections are appointed." Section 12, Acts 1915, p. 220.

Section 347 of the Code of Alabama of 1907 provides that the judge of probate, sheriff and clerk of the circuit court or a majority of them, acting as an appointing board, must not more than twenty nor less than fifteen days before the holding of an election in their county, appoint from the qualified electors of the respective voting places the election officers.

Section 349 of this Code provides that when either of these officers is a candidate, he shall not serve on the appointing board and that it is the duty of the judge of probate to certify such fact to the register in chancery. Upon receiving such certificate the register in chancery or the register of the equity side of the circuit court is charged with forthwith appointing a qualified elector to take the place of such member of the appointing board who is a candidate for election.

From these provisions it will be seen that the officers to hold an election should be appointed by the judge of probate, sheriff and clerk of the circuit court. In the event that either one of these officers is disqualified by reason of the fact that he is a candidate for election in said primary, then a qualified elector appointed by the register in chancery should serve in such disqualified officer's place.

Yours very truly,

HARWELL G. DAVIS,
Attorney General.

FRANCHISE TAX:—Amount of capital stock where increase was not duly certified.

June 2, 1922.

Hon. John S. Mooring, Chairman,
State Tax Commission,
Capitol.

My Dear Sir:

It appears from the file in this matter that the Jackson Lumber Company is a domestic corporation organized in December, 1891, with a principal place of business in Covington County, Alabama, and with an authorized capital stock of five thousand shares of the par value of one hundred dollars. Subsequently, at an exact date which is unknown,

but sometime after the going into effect of the Corporation Law of 1903, and before 1912, the interests of the original incorporators were bought out by the present stock holders, who paid one million eight hundred thousand ($1,800,000.00) dollars and received in lieu thereof, paid up capital stock in the amount of one million eight hundred thousand dollars. It appears from the brief of counsel for Jackson Lumber Company that no certificate of the increase of the capital stock of the Jackson Lumber Company, as required by Section 3480 of the Code of 1907, or Section 46 of the Act of October 2, 1903, upon which said Code section was based, was filed. However, it appears that in December, 1912, the articles of incorporation of the Jackson Lumber Company were amended and that some thirty-nine persons purporting to own sixteen thousand seven hundred and fifty-seven shares of stock subscribed to the amendment. The secretary and president of the corporation certify that the "holders of the larger amount in value of each class of stockholders having voting powers" voted in favor of the amendment.

The Jackson Lumber Company has paid franchise tax on a "paid up capital stock" of five hundred thousand dollars from the years 1912 to 1920 inclusive. In 1921 it was discovered that although no declaration increasing the amount of the capital stock had been filed in the office of the judge of probate of Covington County, that nevertheless eighteen thousand shares of "paid up capital stock" representing a par value of one million eight hundred thousand dollars were outstanding and a franchise tax was assessed and paid on that amount. Under this state of facts several very interesting questions arise, chief among them being, what is the amount of the "paid up capital stock" of the Jackson Lumber Company, upon which it should have paid franchise taxes in the past and upon which should be paid future franchise taxes? In this opinion I propose to waive all other considerations and address myself solely to that question, leaving such matters as the statute of limitations, the time for taking an appeal, set-off and refund to be worked out as the facts relative thereto more definitely appear.

The first franchise tax on corporations in Alabama was levied in 1911 (Acts 1911, page 170, Sec. 12). The tax has

been reenacted with a varying tax rate up to and including the Revenue Bill of 1919, and is still in force. Although the franchise tax is levied upon the privilege of continued corporate existence it has been measured in each of the Acts imposing a franchise tax by the "paid up capital stock" of the corporation.

Acts 1911, p. 170, Sec. 12.
Acts 1915, p. 397, Sec. 16.
Acts 1919, p. 291, Sec. 15.

It is contended by counsel for the Jackson Lumber Company that capital stock issued without authority of law is a mere nullity and cannot be considered in determining the amount of "paid up capital stock." In other words, it is insisted that the phrase "paid up capital stock" means "paid up capital stock duly and legally authorized," and the issue to be decided in the present opinion is whether or not under the facts as above set out the paid up capital stock of the Jackson Lumber Company is five hundred thousand ($500,000.00) dollars or one million eight hundred thousand ($1,800,000.00) dollars.

It is well settled that corporations, being the creatures of the state, have only such powers as are granted them by the Legislature. Previous to the Constitution of 1901 corporations were generally created by a special Act of the Legislature and the terms of the bill creating such corporations were the limit and extent of their powers. In such cases corporations have to look to the Legislature for authority to make any change in their charters. Thus the Legislature alone could at that time increase amount of capital stock of corporations. In 1901, however, special charters to corporations were prohibited and instead incorporation under general laws was made the rule. The Legislature of 1903 passed general incorporation laws which were codified in the Code of 1907, and under these general incorporation laws many powers which theretofore remained in the Legislature were delegated to the stockholders and directors of the corporation. Amongst the powers so delegated was that of increasing the amount of the capital stock of corporations which was delegated to the directors and stockholders without any limit as to the amount to which the

capital stock might be increased, except in case of building and loan associations.

Acts 1903, p. 310, Sec. 46.
Code Section 3480.

Pursuant to Section 234 of the Constitution of 1901 certain procedure for the increase of the capital stock of corporations was prescribed (Code Sec. 3480). This procedure required the consent of the majority of the holders of the capital stock obtained at a regular or special meeting of which due notice had been given and a report of such consent verified by the president and secretary of the corporation under its corporate seal to be filed in the office of the judge of probate in the county in which the corporation was organized.

As we understand the argument of counsel for the Jackson Lumber Company, it is insisted that because this report of the increase of the capital stock of the Jackson Lumber Company was not filed in the office of the judge of probate of Covington County, such increase was absolutely void and the stock issued in pursuance thereof was a nullity and ought not to be included in the amount of "paid up capital stock" of the said corporation. In support of this contention counsel cites Grangers' Life and Health Ins. Co. v. Kamper, 73 Ala. 325 and Fitzpatrick v. Dispatch Publishing Co., 83 Ala. 604. Both these cases construed the effect of an increase of the capital stock by the corporation or stock holders in cases where the *Legislature alone* had the authority to increase capital stock and of course if the Legislature alone had this power, and the Legislature did not act, neither the officers, directors nor stockholders of the corporation could do anything which would "estop" them into the power to do that which the Legislature alone could do.

But under the law in the present case as above outlined, the stockholders of the Jackson Lumber Company, acting since 1903, did have the power to increase the capital stock of the corporation, to be exercised by going through certain forms prescribed in Section 3480 of the Code. They did do something which caused the officers of the company to issue eighteen thousand shares of stock and they paid money for that stock, accepted it, and voted on it, and set it out as being the "paid up capital stock" of the corporation.

For over eleven years they made no pretense that there were only five thousand shares of capital stock of the Jackson Lumber Company, but they admitted and made it a matter of record in the office of the judge of probate of Covington County, by the amendment filed in December, 1912, that there were at least sixteen thousand seven hundred and fifty-seven shares of stock in that corporation. Under such circumstances neither the corporation nor the stockholders can at this late date be heard to say that the capital stock of the Jackson Lumber Company is only five thousand shares of the par value of five hundred thousand dollars.

In the case of Nelson v. Hubbard, 96 Ala. 251, the Court said:

> "The same section of the State Constitution further provides that, 'The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days notice is given in pursuance of law.' The general statutes authorize the increase of stock and bonded indebtedness, and establish definite requirements as to the mode of giving the thirty days notice to the stockholders—Code Sections 1562, 1372, 1664 and 1667. The language of the constitutional provision requiring the giving of such notice indicates that the provision was intended for the benefit of stockholders and to secure them against any impairment of the value of their interests in the corporation, by the increase of its stock or bonded indebtedness, otherwise than with the consent of those holding the larger amount in value of the stock, expressed at a meeting of which, and of the purpose thereof, each stockholder shall have had notice for such length of time as to afford him full opportunity for deliberation. The thing to be insured is that such corporate acts shall be done only with the deliberate consent of the persons interested in the corporations as its stockholders, all of whom shall have the opportunity to object. If such consent is obtained, no one else has the right to complain of the increase of the stock or bonded indebtedness. No purpose is disclosed to

have these provisions serve the end of securing the giving of notice to the public generally, or to persons dealing with corporations, of the enlargement of the interests therein represented by issues of stock, or of incumbrances upon their property. Other provisions secure publicity to the fact that a corporation has been authorized to increase its capital stock. And general laws, applicable alike in the cases of corporations and of individuals, protect persons dealing with them against incumbrances on their property of which there is not notice, either actual or constructive. The view generally accepted by other courts, which have had occasion to determine the effect of similar provisions for notice to stockholders of a proposed increase of stock or bonded indebtedness, is that the only object of the prescribed notice is to inform the shareholders, and afford them the opportunity of protecting their interests by demanding a compliance with the prescribed formalities. It has, accordingly, been held that the persons for whose protection the formalities are prescribed may waive a compliance therewith, and consent that the corporation be bound by acts informally done. In other words, there can be no complaint by others, when the stockholders themselves acquiesce in the disregard of formalities prescribed for their benefit alone. Beecher v. Marquette Rolling Mill Co., 45 Mich. 103; Manhattan Hardware Co. v. Phalen, 128 Pa. St., 110; Wood v. Corry Water Works Co., 44 Fed. Rep. 146; Thomas v. Citizens Horse Railway Co., 104 Ill., 462; 2 Morawetz on Priv. Corp., Sec. 635.

The decisions of our Supreme Court in Barrett v. Pollak, 108 Ala. 390; West Point Mill Co. v. Allen, 143 Ala. 547; L. & N. R. R. Co. v. State ex rel. Gray, 154 Ala. 156 at 220, are to the same effect.

There is nothing in the case of Heide v. Capitol Securities Co., 200 Ala. 397, contrary to the conclusion hereinbefore set out. The gist of the decision in that case is that the Legislature has forbidden the issue of preferred stock in an amount exceeding two-thirds of the common stock. Consequently no ratification on the part of the stockholders could work out an estoppel in such case. On the same prin-

ciple an increase of capital stock made for the purpose of dealing in prohibited liquors or committing arson or other prohibited businesses could never be ratified by anybody. But in the present case the increase was for legitimate purpose and the only procedural defect so far pointed out was that no record of a meeting by the stockholders authorizing such increase was filed in the office of the judge of probate.

In 14 C. J., p. 496, we find the following language:

> "A vote of the stockholders at a meeting called for that purpose is the normal method of increasing the capital stock; and is usually expressly required; and the meeting must be called and held in compliance with the requirements of the charter or statute. But a formal vote at such meeting is not indispensable, and it has been held that the validity of an increase is not affected by holding the meeting outside of the state, at least as regards all parties participating therein; or by failing to *record the resolution* providing for the increase."

On page 503 of the same work we find the rule laid down as follows:

> "Thus the failure of a corporation to file a certificate of the increase of stock with the Secretary of State or other officer as required by the governing statute does not invalidate a subscription to the new shares as between the corporation and stockholders since the object of the statute is primarily the protection of the public."

In Barrows v. Natchauga Silk Co., 72 Conn. 658, 45 At. 951, the failure to record the certificate of the increased capital stock was not permitted to affect the validity of such increase.

If the increase in the number of shares to eighteen thousand was invalid, Jackson Lumber Company as a corporation had a right to attack and avoid such an increase ten or a dozen years ago.

14 C. J., p. 504.

Grangers' Life and Health Ins. Co. v. Kamper, 73 Ala. 325.

Not having so acted, the Jackson Lumber Company, as a corporation, is not now, in my opinion, in a position to make such claim.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General

CAPITAL STOCK TAX:—Double deduction not contemplated by revenue law.

June 5, 1922.

Hon. John S. Mooring,
Chairman, State Tax Commission,
Capitol.

My Dear Sir:

You state and it appears from the brief of counsel for the Jackson Lumber Company that in preparing the statement with respect to the value of the shares of stock in that company two deductions from the total value of the shares were made. First, a deduction of the reasonable "cash value of the real and personal property of the corportion." Acts 1919, p. 290. And second, "the value of the real and personal property of the corporation as returned for taxation." Acts 1919, p. 291.

In my opinion such a double deduction is unauthorized by the language of Section 12 of the Revenue Act of 1919 which imposes a tax on the shares of certain corporations. So far as I have been able to discover there are no decisions of our courts upon the matter and the point here raised is one of original inquiry.

Section 12 of the present revenue Act is a direct descendant and so far as the present question is concerned a verbatim copy of a much litigated section of the General Revenue Laws passed by several Legislatures. See Section 2082 subdivision 9 of the Code of 1907. The Supreme Court in the Lovejoy case, *ex parte* State, 188 Ala. 401, finally interpreted the section as follows:

> "This section also provides that in arriving at an estimate as to the value of the respective shares so assessed there shall be deducted from the aggregate

> amount or sum at which the whole of the shares are assessed the aggregate amount or sum at which the real and personal property of the corporation is returned to the tax assessor for taxation. * * * It will be noticed that the foregoing deduction is the only one authorized by the statute, except as to fire insurance companies owning Alabama bonds."

Since the date of this decision, July 1914, the section under consideration has been changed by the addition only of the proviso that "the assessed value of property owned by such corporation in *other states or counties* on the next preceding first of October" should also be deducted, and it may therefore be said that the present section under the dicta in the Lovejoy case authorizes only one deduction other than that of the property owned in outside states and counties; namely, the deduction of the "reasonable cash value of the real and personal property of the corporation."

The counsel of the Jackson Lumber Company arrives at the conclusion that there should be a double deduction from the fact that the language of the section on page 290 namely, "reasonable cash value of the real and personal property of the corporation" differs from the language of the section on page 291 "value of the real and personal property as returned for taxation."

In my opinion these two phrases mean exactly the same thing. Section 7 of the Act requires "all taxable property within this State shall be assessed for the purpose of taxation at sixty per cent of its fair and reasonable cash value." Subdivision (i) of Section 1 also provides "the term 'value' means the fair and reasonable cash value of the taxable property and shall be estimated at the price which the property would bring at a fair voluntary sale." Fair and reasonable cash value is therefore for the purpose of the Revenue Act of 1919, the same as the value of real and personal property as returned for taxation.

As I see it the language of Section 12 on page 291 "if the aggregate value of the shares does not exceed the aggregate value of the real and personal property of the corporation as returned for taxation then no tax shall be demanded or collected on the shares," means the same thing as the deduction authorized on page 290 and merely pro-

vides for the contingency where the assessed value is equal to the aggregate value of the property of the corporation.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

STATE HIGHWAY BONDS:—Liability of State Highway Department to refund to counties out of proceeds of bond sale the amount appropriated by counties to match Federal aid, and to charge back the amounts so refunded against the county's equitable share of proceeds of sale of State Highway bonds.

June 15, 1922.

Mr. E. A. Henry,
Examiner of Public Accounts,
Mr. H. C. Culverhouse,
Assistant Highway Engineer,
Montgomery, Alabama.

My Dear Sirs:

Your letter of the 10th ult., to Hon. Harwell G. Davis, Attorney General of Alabama, has been referred to me by him for answer.

It is my opinion that the State Highway Department may refund to the counties out of the proceeds of the sale of highway bonds, the amounts heretofore appropriated by the counties to match Federal aid, and that such amounts so paid back to the county may be charged against the county's equitable share of the proceeds of the state bond sale—as is provided for by Section 10 of House Bill 45, Special Session 1921, pages 54, 58.

It is my opinion that this section of the Act above referred to expressly authorizes the action which you say in your letter the State Highway Department. contemplates taking, or which its committee has decided to report to it that it has the right to take.

Yours very truly,
JAMES J. MAYFIELD,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Duty of railroad companies to place public highways close to their tracks in condition satisfactory to county authorities.

June 15, 1922.

Major W. A. McCalla,
Prncipal Assistant Engineer,
State Highway Department,
Montgomery, Alabama.

My Dear Sir:

Your letter of the 13th ult., to Hon. Harwell G. Davis, Attorney General, has been by him referred to me with the request to answer same. With your letter as a statement of the case, I answer as follows:

If the highway or part thereof in question was in existence when the railroad was constructed across it, and if the county never gave up its right to the original roadway passing into the railroad company by virtue of the traffic being diverted therefrom by the federal government or in consequence of the government constructing the nitrate plants near Sheffield, the law places the duty upon the railroad company to both construct and maintain a safe crossing where the railroad crosses the public roads and highways of this State.

Whatever may be or might have been the common law duty of railroads to construct and maintain suitable and safe crossings where the railroad crosses public highways, there has been a statutory duty upon such railroad companies certainly since March 8, 1876 (Acts 1876, Section 15, page 249). This statute when first codified appeared as Section 1842 in the Code of 1876. The provision in this statute has appeared in every Code since that of 1876, and while it has been slightly changed in verbiage, the duty upon the railroad company to construct and maintain such crossing has in the main remained the same. The provision or a similar provision is now found in Section 3493 of the Code, which is a codification of the Act of the Legislature of 1903, page 310, Section 9.

It may be necessary to ascertain the exact date at which the railroad was constructed across the public highway to determine the exact duties and liabilities of the railroad company as for constructing and maintaining a safe crossing, but I feel safe in saying that this duty has remained all

the time upon the railroad notwithstanding slight changes in the verbiage. The language of the statute as it now appears in Section 3493 of the Code is that the railroad company

> "May use, cross, or change public roads when necessary in the construction of their railways, switches, branches, lines or buildings, and must place the public road so crossed, used or changed in condition satisfactory to the county authorities having the control thereof, but where practicable the railroad must go over or under the public roadway or railroad track."

This statute has been at least referred to if not construed in the cases of

L. & N. R. R. Co. v. Hall, 87 Ala. 708.
M. & G. R. R. Co. v. County Commissioners, 97 Ala. 105.
Patterson v. R. R. Co., 89 Ala., 318.

The duty of the railroad to place the highway or public road used or crossed in a condition satisfactory to the authorities was approved in each of these cases, neither of which have been overruled on this point so far as I know.

Yours very truly,
J. J. MAYFIELD,
Assistant Attorney General.

INSECTICIDE AND FUNGICIDE DEALER'S LICENSE:—Due from non-resident who makes deliveries from warehouse maintained in Alabama.

June 22, 1922.

Hon. M. C. Allgood, Commissioner,
Department of Agriculture & Industry,
Capitol.

My Dear Sir:

You have requested an opinion of this office as to whether or not a wholesale druggist having headquarters in Nashville, and a warehouse in Florence in which a stock of insecticides and fungicides are carried is subject to the tax

imposed by Section 11 of the Insecticide Act of 1919 (Acts 1919, p. 709f).

The file furnished this office is silent as to whether or not the wholesaler in question sells the insecticides and fungicides which he keeps in a warehouse at Florence in Alabama or not; but it is to be presumed that unless the goods were sold in Alabam the warehouse would be located somewhere else and the fact that the warehouse is located in Alabama is very good evidence that the fungicides and insecticides are not sold entirely in Tennessee, Mississippi, Georgia and some other state than Alabama. In fact the wholesaler tacitly admits that fungicides are sold by him in Alabama when he says "that the items are only delivered from that point (warehouse) when we have an order for same. All invoices are rendered from our principal office in this city, our accounts are kept from this point and all credits are extended from this point (Nashville)."

The question here presented then is whether or not a wholesaler may avoid paying the tax levied by Section 11 by the simple process of doing all the clerical work in connection with the sale of such insecticides at its home office in another state.

The power of a state to levy an inspection charge upon goods, even though they come into the State as interstate commerce, despite the commerce clause of the Federal Constitution, is well settled. In Robbins v. Shelly Taxing District, 120 U. S. 489, which is the leading case on the subject, the Court said at page 493:

> "It is also an established principle, as already indicated, that the only way in which commerce between the states can be legitimitely affected by state laws, is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, limbs, health, and comfort of persons and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to

regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the state or belonging to its population, and upon avocations and employments pursued therein, not directly connected with foreign or interstate commerce or with some other employment or business exercised under authority of the Constitution, and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein."

See also in this connection 5 Ruling Case Law, page 781.

There can be little doubt that the Alabama Insecticide Law, Acts 1919, page 719ff is a police or inspection measure and that the tax levied thereunder (Section 11) is a mere inspection fee. It is true that the tax is not levied upon each article inspected when, as, and if it is inspected, but the inspection service is supported by a tax levied upon all who deal in the inspected articles and graded in proportion to the amount of business done in such article. This is simply a different method of arriving at the same result and does not render the tax a revenue measure rather than an inspection measure.

I therefore advise you that the wholesaler in question in the absence of other facts which are unknown at present, is liable for the license tax imposed upon dealers in fungicides. A sale is made where title passes and not where the bookkeeping of the seller is done.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

COSTS:—Sheriff attending court as witness entitled to witness fees.

June 29, 1922.

Hon. William F. Feagin,
State Warden General,
Capitol.

My dear Sir:

You asked to be advised whether or not the sheriff of a county is entitled to fees as a State's witness in criminal

cases tried in the circuit court. You state that it is your understanding that under Section 6638 of the Code, sheriffs receive two dollars per day for attendance upon the circuit court in the trial of criminal cases, and that for that reason they are not entitled to fees for attendance as witnesses.

In reply I beg to advise you that after considerable search I have been unable to discover any direct authority upon the matter. There are, however, several statutes of this state and decisions from other states having an important bearing upon the subject, and these authorities will, I believe, be found persuasive by the Supreme Court in the event the matter is ever brought directly before it.

In the case of Torbert v. Hale County, 131 Ala. 143, it was decided that the sheriff of a county is not entitled to extra compensation for his service and attendance upon the regular terms of circuit court when such court is engaged in the trial of criminal cases. In discussing Section 4565 of the Code of 1896, which is the predecessor of Section 6638 of the present Code, and contains the same language as is found in the amendment of Section 6638, which was enacted by the Legislature in 1911 (Acts 1911, page 41) the Court said:

> "The next section relied upon is Section 4565 of the Code. This makes provision for fees of sheriffs in criminal cases. After enumerating certain fees to which sheriffs are entitled, the following provision is made: 'For summoning jury in capital case, or at any special court for trial of criminal, $3. For attendance each day on *such* court, to be paid by the county, $2. These provisions first made their appearance into our statutory system of laws in 1852, when the Code of that date was adopted.—Section 3992. As there found they read: 'For summoning jury in capital case, $3. For summoning jury at any special court for trial of criminal, $3. Attendance on such court each day, $2.' It is apparent that the only substantial difference in phraseology between the two statutes quoted is such as resulted in combining the two provisions allowing the fee of $3 for summoning jury in a capital case and for summoning jury at any special court for the

trial of criminals, and by imposing the liability for attendance on such court upon the county; a difference which cannot and does not work any change of such nature, as would justify a different construction, so far as the point here involved is concerned."

It seems clear therefore that unless some change has been made in the statutory scheme allowing fees for sheriffs, they are entitled to no official fees for attendance on the circuit court in criminal cases.

Section 3722 of the Code of 1907 was amended in 1919 (Acts 1919, page 4), so as to read in part as follows:

"Sheriffs are entitled to receive the following fees for the following services * * * attendance upon the probate court when a jury is in attendance, each day, to be paid out of the county treasury, $3.00 * * * and for all other public services otherwise provided for such sums as may be just to be allowed by the county commissioners' court upon presentation of verified account showing the items of service rendered, to be paid out of the county treasury, not exceeding six hundred dollars per annum, provided, etc."

Section 3722 has always been understood to refer to sheriffs' fees in civil, rather than criminal cases, and for that reason it may well be doubted under the strict construction by which statutes granting fees are tested, that the three dollar attendance fee is chargeable in criminal cases. It may be also that attendance upon the circuit court in criminal cases is a proper item of service for remuneration under the general terms of the statute last quoted. However, it is not necessary to decide these questions at this time, for in determining whether or not the sheriff is entitled to his fees as witness, it makes little difference whether or not he is paid for his attendance upon court as sheriff. In other words, if it is the duty of the sheriff to attend the circuit court in the trial of criminal cases, he takes the office *cum onere* and must perform its duties with or without compensation.

Torbert v. Hale County, 131 Ala. 143.
Mobile County v. Drago, 172 Ala. 155.

The duty of the sheriff to attend all sessions of the circuit court is specifically prescribed by Section 5870 of the Code. It seems to be generally understood however, that this duty may be performed as many other duties of the sheriff are performed, by deputy. (Code Sections 3264, 3265. Murfree On Sheriffs, Sections 425-428.)

It therefore appears that while the sheriff may be present or be represented in his official capacity at every session of the circuit court, yet the sheriff as an individual may be absent. The duties of his office may require that he be away from the court house serving writs, searching out offenders, or the like. If he is wanted at the court house in his individual capacity as a witness he may be compelled to discontinue his duties in other parts of the county and attend. For the time being he has ceased to be a sheriff and has become a witness and under the statute would be entitled to receive witness fees unless some principle of law arise to deprive him of such witness fees.

Some of the cases from jurisdictions other than Alabama have declared that police officers have a duty to attend as witnesses in criminal cases; that while they are attending as witnesses they are acting as prosecuting or law enforcing officers of the county, and consequently are not entitled to the witness fees as well as the official attendance fees. Thus in Healy v. Hillsboro County, 70 N. H. 588, under a statute which provided for compensation of officers when their presence was required in court, the Supreme Court of New Hampshire said that the statute "contains nothing to show that they are to be paid more when their presence is required as witnesses than when it is required for other purposes. So it is improbable that the Legislature intended to pay officers who are attending court for testifying."

And in the case of Starmont v. Cummins, 120 Mich. 629, the court said, at page 630:

> "PER CURIAM. The statute under which relator claims his fees reads as follows: 'That whenever any person shall attend any court as a witness in behalf of the people of this State, upon request of the public prosecutor, or upon a subpoena, or by virtue of any recognizance for that purpose, he shall be entitled to the following fees,' etc. 2 How, Stat. Sec. 9064. The relator was in court as an officer in charge of a pris-

oner, and entitled to receive his fees as such officer. The evident purpose of this statute is to compensate a witness to some extent for his loss of time. Most men are engaged in some employment, which they must necessarily leave in obedience to the subpoena of the court. Relator was not subpoenaed as a witness; he had not come as a witness; he had lost no time as a witness. Those who are familiar with criminal trials are aware that the officer making the arrest is frequently sworn as a witness. Is he, under those circumstances, entitled to fees both as an officer and as a witness? No such rule should be adopted, unless the statute clearly provides it. There is nothing in the statute to indicate it. We think the relator is not entitled to both fees. Com. v. Commissioners of Philadelphia Co., 6 Bin. 397; Board of Commissioners of Montgomery Co. v. Bromley, 108 Ind. 158. Judgment reversed and judgment entered for the respondent."

There are many cases however, which take the contrary view and, drawing a distinction between attendance as an officer and attendance as a witness, declare that there is nothing to prevent the officer from receiving both fees. In Lay v. State, 202 S. W. 729 (Tex.) the court said at page 730:

"With reference to misdemeanors, there is no interdiction of the charging of witness fees so far as officers are concerned. They seem to come within the general class of witnesses, and are entitled to the same fees as other witnesses in misdemeanor cases. A witness in a misdemeanor case can be paid no fees other than those provided, but is entitled to charge such fees as the statute enacts. There being no difference with reference to misdemeanor cases as to the character of witnesses, whether officers or not, the officer would come within the general category, as we understand the law, as witness. His official character, so far as that proposition is concerned, would make no difference. There are no traveling expenses in the case to complicate; therefore we have the question as to whether or not an officer in misdemeanor cases can charge fees as a witness for his attendance upon the court. We are

of opinion that he can, and that the court did not err in allowing the fees charged by the officer."

To the same effect is the opinion in the case of State v. Sailliard, 22 Wash. 267, where the court in discussing the constitutional prohibition against the receipt by an officer of two fees for the same official service said at page 269:

> "These sections were intended to prohibit the legislature, or other body having power to fix salaries or the compensation of public officers, from increasing or diminishing the salary or compensation of an officer when no duty is exacted of him except such as pertains to the office which he holds, and can have no application where the officer may be called on to perform a service for the state which is outside of the duty required of him by his office. In the latter class of cases an officer stands on a plane with other citizens of the state, and, where he performs a service for the public not required of him by the duties of the office which he holds, he may exact the same compensation for his services that the law allows to any one for like services. As it is not shown that it is a duty pertaining to the office of policemen of the city of Spokane for a person holding that office to attend upon the superior court as a witness, the judgment of the lower court must be affirmed, and it is so ordered."

An interesting sidelight is cast upon the question by the rule in the federal court, which holds that under Section 850 of the revised statutes when the Government is entitled to an officer's time the diversion of it from his official routine to attend in court as witness in its behalf shall not entitle him to dual compensation.

> Duvall v. U. S. 23 Ct. of Claims 102.
> Ex parte Burdell, 32 Fed. 681.
> In re Wallter, 49 Fed. 271.

The fact that this result was reached in the Federal court by statute is some evidence that without a statute the rule might have been otherwise.

In Sachett v. Sanborn 205 Mass. 110 it appeared that the police officer in question was the "prosecuting officer of the

department and shall have charge of all complaints and shall use his best efforts to prosecute offenders" and it was held that such an officer was not entitled to a fee as a witness.

All these cases are reconcilable and announce one principle; namely, if it is the duty of the officer claiming the witness fee to attend as witness, as part of his official duty, such officer is not entitled to witness fee; if on the other hand, the officer is not required in his official capacity to be a witness, then when summoned as a witness he attends as an individual and is entitled to the witness fee.

An exhaustive search through Alabama authorities fails to reveal any duty on the part of the sheriff as an officer to attend criminal courts as a witness. It is true that the sheriff is the chief law enforcing officer of the county, and as such, is charged with the duty of apprehending offenders against the law and investigating all crimes and violations of the law. He is jailer, executioner, auctioneer and a great many other things, but he is not an official prosecuting witness. None of the texts on sheriffs disclose such a duty upon him at common law, and I am aware of no statute which imposes such an official obligation upon him.

As we have seen heretofore, his personal presence at sessions of the circuit court is not necessary. He may attend by deputy. In my opinion, therefore, the individual sheriff, who has appeared as a witness for the state in a criminal case tried before the circuit court, is entitled to a *per diem* as witness.

This opinion has not dealt with and leaves entirely undecided the collateral question, whether or not the sheriff is entitled in such cases to a witness's mileage. It may well be that this question is governed by statute and other considerations.

Very truly yours,

MARION RUSHTON,
Assistant Attorney General.

LIVE STOCK INSPECTOR:—Salary a preferred claim of second class against county.

June 30, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts.
Capitol.

My dear Sir:

The Hon. S. J. Sanders, Treasurer of Fayette County, and the Hon. J. G. Davis, Treasurer of Coffee County, have requested a ruling of this office as to whether or not the claim of an inspector of live stock, appointed by the State Live Stock Sanitary Board is a preferred claim against the county.

In reply I beg to advise you that the salaries of such officers are not preferred claims under Section 153 of the Code as amended by Acts of 1901, page 1110. It is true that such inspectors are paid a salary by the county under Section 4 of the tick eradication law, Acts 1919, page 29, and in that sense they are salaried officers of the county, but not being specifically mentioned in the section of the Code above referred, to, their claims for salaries are not preferred within the usual meaning of the word.

However, in the case of Brown, Treasurer, v. Gay-Padgett Hdw. Co., 188 Ala. 423 at 430, the Supreme Court by interpretation added to the category of the claims against counties "preferred claims of the second class," saying:

> "Section 153 of the Code makes a number of specified county obligations preferred claims against the general treasury, and requires the treasurer to set aside sufficient funds for their payment. We think also that, by necessary implication, whenever the assessed revenues of an overburdened county are not sufficient for the payment of all current county obligations, those involuntary obligations which are fixed and imposed by law must be regarded as preferred claims of a second class, which are entitled to precedence over the general and voluntary obligations of the county.
>
> "As a result of the foregoing considerations, we hold that a county which is indebted up to the constitutional limit may nevertheless appropriate its anticipated revenues actually assessed for the payment of its ordinary

current obligations incurred during and for the year for which such revenues are assessed and payable; that the obligations absolutely fixed by law are preferred claims; and that all voluntary obligations assumed or incurred after the exhaustion of the full amount of revenues on hand or in valid expectancy are debts which are repugnant to the Constitution, and are therefore invalid as to their payment."

Since under the terms of the tick eradication law the appropriations for the work of tick eradication are mandatory, such obligations are absolutely fixed by law, and become in my opinion, preferred claims of the second class.

It also often happens that under the act to authorize the issuance of interest bearing warrants, Acts 1920, Special Session, page 10, for tick eradication and road purposes, that live stock inspectors receive interest-bearing warrants in payment for their services. Certain portions of the revenues of the county are required to be set aside and charged with a lien for the payment of such warrants (Section 2), and the warrants so issued are required to be numbered consecutively and to be paid and canceled in a certain prescribed way (Section 5.) It therefore may well happen that interest bearing warrants issued to live stock inspectors for their services may in a different way become in a sense a preferred claim against the county. That is, they become a registered claim against a portion of the annual revenue of the county which is set aside specifically for the payment of such warrants.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

COSTS:—Removal bill not proper item of costs against escaped convict.

July 14, 1922.

Hon. J. Ray Hudgens,
Clerk Circuit Court,
Luverne, Alabama.

Dear Sir:

Under date of June 19th, you wrote Hon. Chas. E. McCall, Chief Examiner of Accounts, as follows:

"We had a convict to run away from the hard labor contractor last year, he was later located in the State of Pennsylvania. The contractor had a warrant issued for him charging him with escape and the sheriff brought him back to this county. The hard labor contractor paid the removal bill. I want to know if this removal bill can be charged in as an item of costs against the defendant. Please let me hear from you in regard to this matter."

Under date of July 1st, Judge McCall referred your letter to the Attorney General, requesting that he advise you direct on the question asked in your letter and the Attorney General has referred the matter to me for reply.

Section 6631 of the Code of 1907 provides that the law of costs must be deemed and held a penal law and no fee must be taken but in cases expressly provided by law, and that the fees prescribed in the Code shall be the only fee that can be collected by any officer.

A careful examination of the statutes shows that there is no provision in the law for taxing the costs of such removal against a convict, and the result is that there is no legal authority for so doing. You are doubtless aware of the provisions of Section 6864 of the Code which provide that any convict sentenced to imprisonment in the county jail or to hard labor for the county who escapes from such confinement or departs or runs away from such labor before the expiration of the time for which he was sentenced, must on conviction be sentenced to the same punishment for not more than six months.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

SOLICITOR'S FEES:—In cases involving violation of prohibition law.

July 18, 1922.

Hon. J. C. Nichols,
Deputy Solicitor,
Heflin, Alabama.

Dear Sir:

The Attorney General has referred to me your letter of the 17th instant in which you state that Judge Agee re-

quested you to write this office for the purpose of ascertaining the proper charges as solicitor's fees in cases involving violations of the prohibition law. You state you have been charging $30.00 and Judge Agee says he has been informed that this office has held that the charge should be limited to $10.00.

You will observe that the last item in Section 6634 of the Code provides for a fee of $30.00 for each conviction for the violation of any law prohibiting or regulating the sale, barter or exchange of spirituous, vinous or malt liquors or intoxicating drinks.

Acts 1915, page 136 provides that the solicitor's fee to be taxed against any defendant convicted on a charge of illegal manufacture of spirituous, vinous or malt liquors or intoxicating drinks, shall be $30.00.

Acts 1919, page 7, Section 2, creates the new offense of having liquors in possession. There is no special provision in the statutes as to what the charge shall be for a solicitor's fee for prosecuting persons charged with having liquors in possession, which is a misdemeanor. The fee for such cases and for all other liquor cases not covered by the two items referred to above for which a charge of $30.00 is allowed, is regulated by that provision in Section 6634 which provides for a fee of $10.00 "for each conviction of a misdemeanor not otherwise provided for."

The ruling which was made by this office referred by Judge Agee is found in the Biennial Report of the Attorney General for the period embraced between October 1, 1918 and September 30, 1920, at page 666. Hon. J. Q. Smith, former Attorney General, was referring to solicitor's fees in cases in which defendants were charged with having liquors in their possession. He stated to Hon. B. T. Roberts, judge of probate at Clayton, Alabama, in his letter of September 30, 1920, "There appears to be no special provision for a solicitor's fees in such cases, and in my opinion the general provision for a fee of $10.00 in misdemeanor cases not otherwise provided for governs." It will be observed that what I have stated above is entirely consistent with the opinion rendered by Mr. Smith.

The result of what is said above is that in all cases in which a defendant may be convicted on a charge of manufacturing liquors, and in all cases in which a defendant

may be convicted for selling liquors, the proper charge is $30.00. In all other cases involving violations of the prohibition laws the proper solicitor's fee is $10.00 in misdemeanor cases.

Under the provisions of Section 6634 of the Code the fee for each conviction of a felony not otherwise provided for is $30.00. The fee for convicting one of having in possession a still, etc., Acts 1919, page 1086, is regulated by this general provision, and the fee in such cases is also $30.00.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

STATE BONDS:—Effect of Debt Settlement Act of 1876 on railroad bonds purporting to have been endorsed by State.

July 18, 1922.

Mr. J. Stanley Howard,
Hartshorne & Battelle,
25 Broad Street, New York, N. Y.

Dear Sir:

The Honorable R. L. Bradley, State Treasurer, has requested me to answer your letter of the 15th ultimo addressed to him relative to the State of Alabama's obligation to pay Selma & Gulf Railroad First Mortgage Bonds.

You request to be advised if the "Debt Settlement Act of 1876" legally relieved the State of obligation upon these bonds.

During several years immediately following the close of the Civil War, the State of Alabama was not controlled by its own people, but by the use of Federal troops. Alabama had forced upon it as a "conquered province" officers, a large majority of whom had no property or other interest in the State and exercised their official power only to exploit the State for their personal gain.

Unscrupulous persons from other States improved the opportunity offered by such a corrupt administration to secure by bribery the passage of laws appropriating state funds for various purposes and lending the State's security to internal improvements. Governor Smith, the then Republican governor of Alabama, but who was not a scalawag, as he had always been a Unionist and Republican from prin-

ciple, opposed much of this legislation, but he was unable to control or influence the corruptionists who were operating in the name of his party, and the laws were passed over his veto. That part of Governor Smith's administration which it is difficult to understand is the fact that he opposed this legislation and yet admittedly endorsed illegally in the name of the State many railroad securities.

The administration succeeding that of Governor Smith endeavored to ascertain the number and amount of such bonds outstanding but it seems was unable to secure information as to all. Governor Smith kept no record of his acts in reference to such endorsements. The records of both the State Treasurer and the State Auditor fail to show the issue and endorsement of a large number of bonds purporting to be secured by the State. The statute providing state guarantee to railroad securities limited the amount that could be issued to a railroad. It was found that large amounts of bonds in excess of this limit purported to be secured by the endorsement of the State. Bonds were found outstanding purporting to be endorsed by the State which all officials denied endorsing. Thus was the endorsement of the State forged and otherwise illegally and fraudulently obtained during an administration which was neither by nor for the people of Alabama.

When the people of Alabama again obtained control of the affairs of the State they were an impoverished people, not only from the ravages of war and crop failure, but also from the result of this corrupt administration of the State government. The State treasury was looted and millions of dollars of the State's purported obligations were outstanding. For the purpose of protecting bona fide creditors of the State there was created what is known as the "Debt Settlement Commission," the duties of which were to investigate and ascertain what securities were valid or moral obligations of the State and to adjust the same. This Commission spent several years advertising for securities purporting to be endorsed by the State and making as thorough investigation of the issue of such securities as possible. It is needless to catalogue its finding here.

This Commission held a conference with the bondholders of many of the railroads and reached an agreement releasing the State from the endorsement on their bonds in consideration of the State releasing to the bondholders

the prior lien which the State held on the railroad properties and the State issuing new bonds to such bondholders for the difference between the face value of the old bond and the estimated value of the property which was released from the lien of the State. All bonds legally or morally binding on the State were settled by consent of those concerned in this manner. This settlement was approved by the Legislature in what is known as the "Debt Settlement Act of 1876."

The "Debt Settlement Act of 1876" did not include the Selma & Gulf Railroad First Mortgage Bonds, except to indicate that these bonds were not binding on the State. The newspapers of this State during the "Reconstruction Period" repeatedly put the public on notice of these illegal and fraudulent endorsements. The Selma & Gulf Railroad First Mortgage Bonds were one of the worst of the frauds perpetrated in the name of the State of Alabama. A commission appointed by the Legislature of this State in 1871 to investigate this matter reported that, "This road affords another extraordinary instance of a railroad corporation having secured the endorsement of its bonds in the name of the State in violation of the statutes." These bonds have never been considered in any respect the obligation of the State, either morally or legally.

The Selma & Gulf Railroad First Mortgage Bonds evidence nothing except the criminal corruptness of those who outraged the good people of Alabama during the years immediately following the close of the Civil War and whose acts have caused some who are not familiar with the history of the State during that period to believe that the State of Alabama repudiated its just and legal obligations.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

TRIAL TAX:—In suits by municipality against delinquent tax payers.

Hon. A. H. Shepperd, July 21, 1922.
Register of Circuit Court,
Anniston, Alabama.

Dear Sir:

The Attorney General has referred to me your letter of the 14th instant in which you ask to be informed "whether

cases docketed in the circuit court in equity as provided in Section 1320 of the Code where lists of delinquent taxes are filed with the Register by the City of Anniston, each bear the tax of three dollars as provided in Section 4½ of the Revenue Act."

Section 1319 of the Code of 1907 requires the city or town clerk within three months after taxes shall have become delinquent to make out and certify a list describing each piece of property separately with the name of the owner, if known, and the amount of taxes due on such property and the amount of taxes due by such owner upon personal property.

Section 1320 of the Code mentioned in your letter provides that such lists shall be filed with the register in chancery or like officer of a court of the county having equity jurisdiction therein. Said section further provides that the register shall cause to be docketed in such court in a well bound book kept for that purpose, "a cause for *each* assessment of property" of the city or town against such property so assessed.

Section 4½ of the Revenue Act (Acts 1919, page 284) provides that a trial tax of $3.00 is imposed in "each case civil, criminal and equity which hereafter goes upon the docket of any circuit court in this State."

The chancery courts referred to in Section 1320 of the Code were consolidated into the circuit courts.

Acts 1915, page 279;
Baker Lyons & Co. v. Eliasberg & Bros. Mercantile Co., 79 So. 13.

Since Section 4½ of the Revenue Act requires that the trial tax be imposed in each case going upon the circuit court docket, the only question to be determined is whether the proceedings referred to in Section 1320 of the Code constitute cases going upon the docket in the circuit court. This is answered in the affirmative in Section 1320 of the Code by the requirement that the register shall cause to be docketed in the circuit court a case for each assessment of property.

I am therefore of the opinion that each case docketed under the provisions of Section 1320 of the Code is sub-

ject to the trial tax of $3.00 provided for in Section 4½ of the Revenue Act.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

BOARDS OF HEALTH:—Enforcement of rules and regulations as to opening of ditches to prevent malaria.

July 24, 1922.

Dr. S. W. Welch,
State Health Officer,
Capitol.

Dear Sir:

The Attorney General has referred to me your letter of the 19th instant enclosing letter from Dr. J. L. Bowman, Health Officer for city and county of Montgomery, to you under date of 18th instant. I return herewith Dr. Bowman's letter.

You asked to be advised if the Board of Health has the authority to compel the opening of ditches which are potential causes of malaria, but where malaria does not at the time exist.

Under the provisions of Acts 1919, page 911, the State Board of Health has the authority to adopt and promulgate rules and regulations providing proper methods in detail for administering the health and sanitary laws of the State, which rules and regulations have the force and effect of law and shall be executed and enforced in the same manner as the health laws, it being provided that any person knowingly violating, failing or refusing to obey or comply with any such rules and regulations shall be guilty of a misdemeanor and shall be punished in accordance with the provisions of Section 7073 of the Code, and if the violation or failure is a continuous one, each day's violation or failure shall constitute a separate offense and be punished accordingly. The penalty provided by Section 7073 of the Code is not less than five nor more than one hundred dollars unless otherwise expressly provided for.

In the case of Parks et al v. Bradley, State Treasurer, et al, 86 South. 28, the Supreme Court held that the Legislature had the power to delegate to the State Board of

Health the authority contained in Section 6 above mentioned.

Under the provisions of Acts 1919, page 912 (1), the county boards of health are given authority to supervise the enforcement of the health laws of the State, including all ordinances and regulations of municipalities or of county boards of health or of the State Board of Health; and to adopt and promulgate if necessary rules and regulations of the State Board of Health, which rules and regulations of the county boards of health shall have the force and effect of law and shall be executed and enforced as in the case of health laws; and any person knowingly violating or failing or refusing to obey or comply with any such rules or regulations shall be guilty of a misdemeanor, and shall be punished in accordance with the provisions of Section 7073 of the Code; and if the violation or failure is a continuing one each day's violation or failure shall constitute a separate offense and be punished accordingly. Under subdivision 3 on the same page of said Act, the county board of health is vested with the authority to investigate through county health officers or quarantine officers, all nuisances to public health and through said officers to take proper steps for the abatement of such nuisances.

Under the provisions of Acts 1919, page 942 (5), (6), (8), the following are declared to be public nuisances *per se* menacing public health and unlawful, namely: Such acts, things or conditions as may from time to time be, by the rules and regulations of the State Board of Health declared to be public nuisances *per se* menacing the public health; the ownership, possession, management, control, maintenance, permitting or the use of any of the things or conditions described or referred to in this subdivision or in any rule or regulation adopted under paragraph 5 of this subdivision; the doing of a thing lawful but inherently insanitary or a menace to public health without complying with such safeguards for the protection of health as may from time to time be prescribed by the rules and regulations of the State Board of Health.

Under the provisions of Acts 1919, page 942 (2) insanitary yards, premises and places which are or are likely to become menaces to public health are declared to be public nuisances *per se,* menacing public health and unlawful.

From what has been said above it will be observed that yards, premises and places which are or are likely to become menaces to public health are declared to be public nuisances. The State Board of Health and the county boards of health are vested with the authority to adopt rules and regulations in connection therewith a violation of which is a misdemeanor.

Under the provisions of Acts 1919, page 942, subdivision 2, any such nuisances shall be abated by the county board of health, and the county health officer in any of the ways provided in this section that may be approved or in any other lawful manner, including abatement by bill in equity, and an effort to abate by one method shall not preclude resort to any other method or methods. It is here further provided that in litigation undertaken by such boards for the abatement of a nuisance, said litigation may be conducted in the name of said board.

I am therefore of the opinion that conditions such as are referred to in your letter constitute nuisances *per se* which may be abated in the manner above mentioned, and that if the State Board of Health or the county boards of health have adopted any rule or regulations as to how such conditions shall be remedied, a violation of such rules and regulations is a misdemeanor and punishable as such.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

JUVENILE COURTS:—May punish for contempt.

July 27, 1922.

Mrs. L. B. Bush, Director,
Child Welfare Department,
Montgomery, Alabama.

Dear Mrs. Bush:

The Attorney General has referred to me your letter of the 22d instant in which you inquire whether the judge of the juvenile court of Mobile has the right to punish for contempt of court.

I understand from the conversation with Mr. Green of your Department that a certain party was ordered by the

Judge of the Juvenile Court to bring a child into court for the purpose of being committed to some home; that he refused to do so, and the judge of the juvenile court desires to know whether he can proceed against him and other parties committing similar acts, for contempt of court.

Contempt of court may be either direct such as an open insult committed in the presence of the court to the presiding judge or a resistance or defiance in his presence to its powers or authority, or improper conduct so near to the court as to interrupt its proceedings as in the instant case; or contempt may be constructive instead of direct, constructive contempt being an act done not in the presence of the court but at a distance which tends to belittle, to degrade or to obstruct, interrupt, prevent or embarrass the administration of justice.

13 C. J. 5.

Contempt of court may also be criminal or civil in nature. Criminal contempt is conduct that is directed against the dignity and authority of the court, and may occur in either criminal or civil actions and special proceedings. The contempt in the instant case is a criminal contempt. Civil contempt consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party, and is therefore not an offense against the dignity of the court, but against the party in whose behalf the violated order is made.

13 C. J. 6.

Disobedience or resistance of or an attempt to prevent the execution of a lawful order, judgment, decree or mandate of a court, as in the instant case, is such an interference with or attempt to obstruct the administration of justice as to constitute a contempt.

13. C. J. 9.

Your attention is invited to the provisions of Sections 4630, 4631, 4632 of the Code, which deal with the powers of courts to punish for contempt.

Section 4631 provides that *every court* has the power to compel obedience to its judgments, orders and processes and to the orders of a judge out of court in an action or proceeding therein; to control in furtherance of justice all persons connected with a judicial proceeding before it in any matter appertaining thereto.

Section 4630 of the Code provides that the powers of the several courts in this State to issue attachments and inflict summary punishment for contempt does not extend to other cases than the seven there mentioned, two of which here pertinent are as follows:

Disobedience or resistance of any person to any lawful right, process, order, rule, decree, order, or command, thereof.

Any unlawful interference with the process or proceedings of the court.

Section 4632 provides that for the effectual exercise of the powers conferred by Section 4631 the court may punish for contempt in the cases provided for in this chapter.

Section 6693 of the Code which you mention in your letter confers upon certain named courts the right to fine and imprison persons committing contempts as to such courts, as are named in Section 6693. Limitation both as to the amount of the fine and the duration of the imprisonment is stipulated.

It will be observed, however, that no limitation is placed upon the court in punishing for contempt under the provisions of Sections 4630-31-32.

It results from what has been said above that no limitation is fixed for punishment for contempt in the juvenile court, although there is a limitation both as to fine and imprisonment as to the courts mentioned in Section 6693 of the Code.

In *ex parte* Hardy, 68 Ala. 315, the Court says it cannot be denied that every court is the exclusive judge of a contempt committed in its presence or against its process, and that the exercise of such power by a court of competent jurisdiction cannot be revised on error nor assailed collaterally by resort to a writ of habeas corpus; that no doubt can be entertained of the authority of the courts to enforce their decree by process of attachment, without which they would be bereft of all possible power to maintain the majesty of the law as against refractory litigants and even impotent to preserve their own existence; that punishment for contempt has a double aspect, first, to vindicate the dignity of the court for disrespect exhibited to it or its order; secondly, to compel the performance of some order or decree of the court which is in the power of the party

to perform and which he without sufficient excuse refuses to obey.

In Coleman et al v. Roberts, 113 Ala. 328, the court says the power to punish contempt by fines and imprisonment is incident to all courts of justice, and without such power the administration of the law would be in continual danger of being thwarted by the lawless; that the power seems to be as ancient as courts themselves.

The court in referring to Sections 4631-2-3 above referred to uses the following language:

> "With as much of precision as the nature of the subject will admit the statute enumerates the acts or conduct constituting contempt which may be punished summarily; and of these acts or conduct there is not one probably which was not at common law deemed a contempt."

Continuing, the Court says that the words of the statute are broad and general, comprehending *all* courts, whether they be of the class termed of superior or inferior jurisdiction.

In Early v. Fitzpatrick at al, 161 Ala. 172, the court says it is too well settled in this State to need extended argument that a justice of the peace, like other judical officers, has jurisdiction to punish for contempt; also that no judicial officer can be held liable in an action for damage on account of his judicial action.

In *ex parte* Dickens, 162 Ala. 280, the court uses the following language:

> "The courts have the inherent right to punish for contempt of court, and although contempts are divided into criminal and civil contempts, yet the power of the court in each rests upon its right to protect its dignity and demand obedience to its decrees."

I am of the opinion that the judge of the juvenile court at Mobile, in fact judges of any court of any nature in Alabama, have the authority to punish anyone who may be guilty of contempt of such court. As is stated in the authorities above cited, courts would be shorn of all power to

administer the law if the power of punishment for contempt shall be taken away.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

PUBLIC HIGHWAYS:—Refund to counties of amounts appropriated to match Federal aid.

July 28, 1922.

Hon. W. S. Keller,
State Highway Engineer,
Montgomery, Alabama.

Dear Sir:

Replying to your letter of the 28th instant I beg to advise that in my opinion the provisions of Section 10 of the State Highway Law, approved October 31, 1921, (Acts Special Session 1921, page 58), were intended to enable the State Highway Commission to refund to any county money which was expended by said county since October 1, 1919, to match a like sum of money given by the Federal Government through the State Highway Department for road or bridge construction.

Section 10 of the 1921 Act was evidently intended to cover the same character and class of conditions as was Section 8½ of the Highway Law of 1919 (Acts 1919, page 894). This latter section provides as follows:

> "When any county in the State, shall appropriate any sum of money to match a like sum of money given by the Federal Government, through the State Highway Department for the construction of a Federal Aid Project, provided work on such project begins after the passage of this Act, the said County shall be refunded an amount equal to the amount expended by the county on the project, by the State Highway Commission from any funds that may be derived from the sale of State Road Bonds. . ."

When these two sections are considered together it is evident that the intention of the law-making body was to authorize a refund to counties of money expended by such

counties for the construction of a Federal Aid Project where such an appropriation and expenditure of the county were made on the faith of securing such refund by virtue of the provisions of these sections.

Yours very truly,
HARWELL G. DAVIS,
Attorney General.

SOCIETY FOR PREVENTION OF CRUELTY TO ANIMALS:—May not receive fines imposed for violation of laws.

August 3, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

My Dear Sir:

A question has arisen as to the right of the Mobile Society for the Prevention of Cruelty to Animals to receive a fine imposed by the inferior court of Mobile County, and collected by the clerk thereof, for a violation of the laws of the State against cruelty to animals and children. The matter is an important one involving a constitutional question as to the power of the Legislature to devote public money to private uses, and your request for an opinion has been given very careful consideration.

The Mobile Society for the Prevention of Cruelty to Animals was organized on the second day of June, 1885, under the General Laws of the State of Alabama with a declared purpose of "Preventing cruelty to animals." Chapter 2 of the by-laws of the Society provides, "The objects of this society are to provide effective means for the prevention of cruelty to animals and children within the State of Alabama; to enforce all laws which are now or may hereafter be enacted for the protection of animals and children and to secure by lawful means the arrest, conviction and punishment of all persons violating such laws." Some thirteen residents of the County of Mobile were named as incorporators and the work of that Society has been carried or continuously for thirty-seven years, and is still being performed. Its annual report for the year 1921-22 shows that during the last year it has investigated and disposed of five hundred and fifty-two cases in which animals were in-

volved, twelve cases in which children were involved, and thirteen cases in which adults were involved. It is therefore today an active institution doing a very useful and necessary work.

On December 9, 1890, an act was approved which provided as follows:

> "An Act to regulate the disposition of fines arising from prosecutions under the laws of this state for Cruelty to Children and Animals.
>
> "Section 1. Be it enacted by the General Assembly of Alabama, that all fines, penalties and forfeitures imposed and collected in any county in this State under the provisions of every act passed, or which may be passed, relating to, or in anywise affecting children or animals, except when otherwise provided, shall enure to the duly incorporated society for the prevention of cruelty to animals, organized in such county, in aid of the purpose for which it was incorporated and of the efficient enforcement of the laws against cruelty to children and animals.
>
> "Section 2. Be it further enacted, that the provisions of this act shall apply only to such counties in which such societies exist or may hereafter exist, Provided, That the counties of Marion, Franklin, Fayette and Lamar be excepted from the operations of the bill.
>
> Approved December 9, 1890."

This act, although not incorporated in the Codes of 1896 or 1907, has not been repealed by these codifications because under Section 2 the extent of the Act is limited and it is not a general law. It is therefore within the saving clause of Section 10, of the Code of 1896 and 1907. The inferior criminal court of Mobile County by which the fine in question was levied and collected was created under an act of the Legislature approved February 23, 1899. By Section 6 of that act the clerk of that court was required "to assess in each criminal case all the costs, fines and fees provided under the laws of Alabama for justices of the peace, and such money so collected shall be by him at once paid over to the judge of the said Court." By Section 9 it was provided "that it shall be the duty of such judge to report and

pay into the County Treasury on Monday of each week the amount of fines and forfeitures, penalties and costs, collected by him since the date of his last report."

While this legislation although subsequent to the Act of 1890-91 does not necessarily provide a different final disposition of fines imposed in cruelty to animal cases from that provided in the former act, still the direction given the clerk of the inferior criminal court as to whom he shall pay the money, and the direction given the judge as to what disposition he shall make of the money, are mandatory. Whatever doubt may arise as to the final disposition of fines levied in the inferior criminal court for violations of the laws against cruelty to animals may be made, it is clearly the duty of the clerk and judge to pay such money into the County Treasury.

Is the Mobile Society for Prevention of Cruelty to Animals entitled to receive the fines arising from the sources enumerated out of the County Treasury?

Under the present Constitution and under that of 1875 which was in force at the time at which the act of 1890 was passed, any distribution of public funds to other than public institutions controlled by the state is looked upon with disfavor. The grant of special privileges and immunities and the loan of the money or credit of the state to any private institution, no matter how necessary, charitable or praiseworthy its aims and its purposes may be, has been surrounded by the makers of our organic law with very definite limitations.

Under Section 34 of Article 4 of the Constitution of 1875 it was provided that "no appropriation shall be made to any charitable or educational institution not under the absolute control of the state other than normal schools established by law for the professional training of teachers for the public schools of the state, except by a vote of two-thirds of all the members elected to each house." The word *appropriation,* as it appears in the foregoing section is not, in my opinion, to be construed with the technical limitations which surround its use in connection with appropriation bills.

Article 4, Sections 32 and 33 of the Constitution of 1875.

It evidently includes any gift or transfer of state funds. The Mobile Society for the Prevention of Cruelty to Animals may well be regarded as a charitable institution.

Mass. S. P. C. A. v. Boston, 142 Mass. 24.

An appropriation for its benefit is well within the power of the Legislature, provided it obtains the approval of two-thirds of all the members elected in each house. An examination of the journal of the House and Senate for the legislative sessions 1890-91, shows that although the Act of 1890 received twenty-three votes from the thirty-two seats in the Senate (Senate Journal p. 4 and 119), it received only fifty-seven votes from ninety-nine seats in the House of Representatives (House Journal pages 5 and 297.) It therefore failed in the House of Representatives to receive the required majority of two-thirds and the appropriation cannot stand under Section 34 Article 4 of the Constitution of 1875.

It is insisted, however, that the Mobile Society for the Prevention of Cruelty to Animals is not a charitable, but a law enforcing body,—a subordinate governmental agency —and that appropriations of public money may be made to it as to other administrative arms of the State. The creation and use by the State Government of subordinate agencies, frequently called *quasi* public corporations, is familiar. The Highway Commission, the Public Service Commission, the State Live Stock Sanitary Board, the State Board of Health, and many other departments and commissions are well known examples of the exercise of such authority, and it has been held in this state, that it is not beyond the power of the Legislature to constitute the Medical Association the Board of Health of the State, although the members and officers of such association were and are chosen by the association itself, even though such an association be considered a private corporation. Parke v. Bradley, 86 South. 28. It was carefully shown, however, in the case last cited that the Medical Association had been designated by law as the State Board of Health, and that certain duties and responsibilities were placed upon it which it cannot evade.

No act of the Legislature constituting the Mobile Society for the Prevention of Cruelty to Animals "the duly incorporated society for the prevention of cruelty to animals organized in such county," has come to my attention. No obligation to account for the moneys received from the state has been imposed upon it, nor have its officers or members any duties or responsibilities to the State Government.

It is not, therefore in my opinion, such a legally sanctioned public corporation as is entitled or authorized to receive public support.

Nor in my opinion is it possible to justify the appropriation of such fines to the Mobile Society for the Prevention of Cruelty to Animals as an informers' fee, for the appropriation is not made conditional upon the rendering of informers' services by the Society. On the contrary, the Society under the terms of the act receives all fees even though some one not connected with the society may have been the active prosecutor.

I therefore advise you that in my opinion all fines for violation of the laws against cruelty to animals and children levied and collected in the Inferior Criminal Court of Mobile County should be paid by the clerk of said court to the judge who in turn should pay the money into the county treasury. And it is my further opinion that regardless of long continued usage and customs, the Mobile Society for the Prevention of Cruelty to Animals is not entitled to receive such moneys from the county treasury.

Very truly yours,
MARION RUSHTON,
Assistant Attorney General.

SHERIFFS:—May not collect salary allowed chief deputy when no chief deputy has been appointed.

ELECTION OFFICERS:—Statutory pay may be supplemented in certain cases.

August 7, 1922.

Hon. J. F. Cogdell,
Acting Chief Examiner of Accounts,
Capitol.

My Dear Sir:

You have referred to this office for its opinion the two questions propounded by L. A. Easterly, Assistant Examiner of Accounts, in a letter dated August 2, 1922, namely:

One: Is a sheriff entitled to file a claim in his own name for the monthly pay of a chief deputy sheriff, to indorse the warrant, and to collect the money himself? It is stated inferentially that such a chief deputy has not been appointed or employed by the sheriff.

In answer to this question I beg to advise that under Section 5869 of the Code of 1907 each sheriff is required to have one deputy and under acts of 1919 page 792, it is provided that in all counties which have a population of not more than two hundred thousand inhabitants, and in which the sheriff is not on salary basis under constitutional amendment, the sheriff must have a chief deputy, and may have as many other deputies as he thinks proper. The specific provision as to the manner in which the chief deputy shall be paid is as follows.

> "The said chief deputy shall be appointed by the sheriff of the county to hold office at the pleasure of the sheriff, and for his services shall receive a salary of such amount as may be fixed by the court of county Commissioners, Board of Revenue or other governing body of the county in which such chief deputy is appointed, not less than three hundred dollars nor more than fifteen hundred dollars payable in twelve equal monthly installments out of the treasury of the county upon the warrant of the board of revenue or the court of county commissioners of such county."

It thus appears that so far as salary is concerned the chief deputy is within the control of the Board of County Commissioners, and it is an unescapable inference from this provision of the law that the chief deputy alone shall receive and receipt for the amount of money fixed by the board of commissioners. Statutes granting salaries or fees to public officers are strictly construed and in my opinion it is an unwarrantable wrenching of the statute above cited which would authorize the sheriff to receive the salary of the chief deputy.

Two: The second question is as to the amount of compensation to be paid officers of elections for their services. Section 419 of the Code of Alabama fixes the salaries of the returning officer, inspectors and clerks at two dollars per day with mileage in cases where an *election* is to be held. Section 8 of the primary law as amended by the Act of 1919 (Acts 1919, p. 969) provides for the payment by the county of the same expenses in *primary* election as those provided for under the general election laws. It is specifically

"Provided, however, that in cases of need a county committee of any county having by the last or any future census, a population of forty-five thousand or more, shall have authority after resolution duly passed to provide for furnishing meals, and reasonably supplement the statutory pay of election officers, but only when such resolution is passed at least thirty days before it is known who are such officers."

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

NOTARY PUBLIC EX OFFICIO JUSTICE OF THE PEACE:— Validity of acts performed after expiration of term.

August 12, 1922.

Hon. Washington Gardner, Commissioner,
Bureau of Pensions,
Washington, D. C.

My Dear Sir:

This office is in receipt of your letter of August 7, 1922, requesting an opinion as to whether or not "A person who has been appointed as a notary public and ex officio justice of the peace may after the expiration of his term, legally act as such officer in connection with papers requiring execution before an officer duly authorized to administer oaths for general purposes."

In reply I take pleasure in advising you as follows: Notaries ex officio justices of the peace are appointed by the Governor of Alabama under the authority of Section 5175 of the Code of 1907 to hold office for four years. There is no provision that they hold office until their successors are appointed and qualified. It has been specifically held by the Supreme Court in the case of Cary v. State 76 Ala. 78, at page 83, that such a statutory provision excludes by obvious implication "a construction which would permit them to hold for a single day after the expiration of their commissions."

However, the court said further:

"The rule is well settled that the official acts of an officer *de facto* are just as valid for all purposes as

those of an officer *de jure* so far as the public and third persons are concerned. Joseph v. Cawthon, 74 Ala. 411 and cases cited. As observed by Southerland, J., in Wilcox v. Smith, 5 Wend, 231, "The affairs of society could not be carried on upon any other principle."

The answer to the question propounded depends, therefore, upon whether or not the officer in question was an officer *de facto*. This is a mingled question of law and fact which has to be determined in every case. The general rules which govern it are set forth in another quotation from the Carey case cited above.

"To constitute Nabors a *de facto* notary, within the above principles, he must either have acted under color of appointment and claim of official right, or he must have continued to exercise the duties of his office, by public acquiescence, for such length of time and by such frequency of repetition as to afford reasonable presumption of his holding over a re-appointment. The first commission having expired, without any right in law to hold over, it could not, in our judgment, lend color for any length of time beyond its expiration.

"As observed by Butler, C. J., in State v. Carroll, 38 Conn, 499, (s. c. Amer. Rep. 426, supra), it seems absurd to say that color from election or appointment can extend beyond the distinct and independent term for which the officer was elected or appointed—beyond the term when the officer was elected or appointed —beyond the term when the election or appointment could be made operative, if legal. Yet, although an expired commission is not color of title to office, still, if an elected or appointed public officer continues, without break, and without question by the public, to exercise the functions of the office, after the expiration of his commission, this is a continued exercise of the duties of the office by acquiescence, and, under the modern rule, constituted the person thus acting an officer *de facto*. In Brown v. Lunt, 37 Me. 432, a justice of the peace who held over without legal right or re-appointment, continued to act, and took an acknowledgement of a deed about *two years* after the expiration of his term

of office. In Gilliam v. Reddick 4 Ired. (N. C.), 368, where an officer elected to hold for four years, without any right to hold over, continued to exercise the duties of the office for about nine years, without re-appointment or re-elction, an official act performed by him was sustained upon the ground that he was an officer *de facto*, acting openly and notoriously in the office for a considerable length of time, and his act in the particular case, which was recording a deed, concerned the rights of third persons or the public, and was therefore deemed to be as valid as the similar act of a rightful officer.

"It is manifest, moreover, than an appointment may often be presumed upon evidence which would fail to justify presumption of a popular election, because it is an investiture of office less public in its nature, and the whole doctrine imparting validity to the unauthorized acts of *de facto* officers is one based on justice, necessity and public policy, and is intended chiefly for the protection of an innocent public who may be ignorant of the officer's defect of official title.—Joseph v. Cawthorn. 74 Ala. 411."

These general principles seem to be in entire conformity with the law as settled in other states of the Union. See L. R. A. 1918 D. 1079 Note.

I regret that from the meagre facts stated in your letter it is impossible for me to gve you a definite categorical answer to your question. I trust, however, that the principles above set forth can be applied by you to the particular facts of this case, so that a definite result may be achieved.

Yours very truly,
MARION RUSHTON,
Assistant Attorney General.

NATIONAL GUARD:—Employees of State entitled to leave of absence to attend encampment.

Hon. W. S. Keller, August 12, 1922.
State Highway Engineer,
Montgomery, Alabama.

My Dear Sir:

Replying to your letter of the 11th instant requesting to be advised whether or not members of the State Highway

Commission can be paid for the time they are away from their work, and are in training as members of the National Guard of this State, I beg to advise as follows:

Section 19 of an act approved September 19,1919, Acts 1919, page 473, provides that

> "All officers and employees of the State of Alabama who shall be members of the National Guard of Alabama, shall be entitled to leave of absence from their respective duties, without loss of pay, time or efficiency rating, on all days during which they shall be engaged in field or coast defense or other training ordered under the provisions of this act, provided that leaves of absence granted under the provisions of this section shall not exceed fifteen days at any one time."

This section provides for giving leaves of absence to all employees of the state for the fifteen day period which they will be required to be in training at Camp McClellan, Anniston, Alabama. I will say furthermore, that the policy of the State has been to urge citizens who have members of the National Guard in their employ to pay the members of the National Guard their regular salary during the time they are required to be in training. I do not think that the State or any department under its control, could refuse to do less than it urges the citizens of the State to do.

It is my opinion that the intention of the above cited section was to require the payment of state employees their full salary during the time they are at encampment.

Very truly yours,
HARWELL G. DAVIS,
Attorney General.

LABOR AGENT'S LICENSE:—Not void for being excessive in amount. Both principal and agent pay license tax. Licenses required for each county where licensee does business.

Hon. A. A. Evans, August 16, 1922.
State Tax Commission,
Capitol.

Dear Sir:

The Attorney General has requested me to reply to your letter of the 15th instant entitled "license on labor agents."

The first inquiry propounded in your letter is the following: "Is the license tax on labor agents under schedule 129 of Section 361 of the Revenue Act of 1919 void on account of being excessive in amount?"

In 25 Cyc. at page 612, IV. the textwriter states that "the act of an authority imposing a license tax is regarded as discretionary and not subject to review if it is exacted in the exercise of taxing power, or in the exercise of power to prohibit."

I am therefore of the opinion that the statute here referred to is not void on account of being excessive in amount.

The second inquiry contained in your letter is as follows:

> "Does the sending of literature into a county for the purpose of inducing labor to leave the State and go to some other place to work, and the sending of a man into the county for the purpose of paying the transportation of laborers to the place of destination constitute such conduct on the part of one who has not come personally into the county that of a labor agent and render him liable for a license under Schedule 129, or does it render the person who has come into the county for the purpose of arranging for the transportation of such labor liable as a labor agent under Schedule 129?"

Labor Agents are defined in the statute (Acts 1919, page 439) as being each person who shall engage in,—

1. Advertising for laborers to go or to be employed outside of Alabama;
2. Furnishing, arranging or providing transportation for laborers to go beyond the limits of Alabama;
3. Hiring or soliciting laborers to go or to be employed outside of Alabama.

The statute also provides that all assistants, sub-agents, partners, associates or employes of the three classes of persons named above shall be subject to the license levied by the statute whether the license be paid by the employer, principal, partner, or associate or not.

I am of the opinion that both the principal and agent would be liable for the license under the facts set forth in your letter. The facts, in my judgment, would render the

principal liable under each of the three subdivisions above mentioned since the acts of the agent within the scope of his employment and within the line of his duties are the acts of the principal. The principal advertises for the laborers, and sends his agents to supply transportation. In so doing, if followed as a calling for the purpose of a livelihood, the principal engages in the business of hiring or soliciting laborers. The agent is also liable for the tax under the statute as above mentioned, regardless of whether the license shall have been paid by the principal.

The third inquiry contained in your letter is as follows:

> "Is the State and county license required in each county where such business is carried on in the manner above described?"

The question is answered by the provision in Schedule 129 to the effect that "the license shall be paid in each county in which such labor agent engages in business or operates or undertakes to operate." I am of the opinion that the payment of $2500 for the use of the State and of $1250 for the use of the county should be required in every county in which purchaser of such license may desire to operate, that is to say, the purchaser of such license may not pay the sum of $2500 for the use of the State and be exempt from the payment of such amount in all other counties of the State, but must pay it as to every county in which business is to be conducted, just as he must pay $1250 for the use of the county in every county in which he wishes to engage in business.

I wish to call attention to the case of Braxton vs. City of Selma, 79 South. 150, in which numerous cases are cited which discuss the question of licenses for labor agents.

Yours very truly,

LAMAR FIELD,

Assistant Attorney General.

PUBLIC SERVICE COMMISSION:—Discharge of the clerk or secretary by two of the Commissioners.

August 19, 1922.

Hon. A. G. Patterson, President,
Alabama Public Service Commission,
Capitol.

My Dear Sir:

Your inquiry of August 12, 1922, to the Attorney General, as to whether or not the associate members of the Public Service Commission had authority to dismiss Mr. White as clerk or secretary of the Commission, and in the manner attempted as shown by the minutes of the Commission held August 12, 1922, and as to the action of the associate members of the Commission in that matter in view of the action of the Commisson in employing the clerk or secretary as shown by the minutes of the Commission and in view of a contract by and between the Commission and the clerk or secretary, a copy of which is attached as an exhibit to your letter of inquiry, has been by the Attorney General referred to me for answer.

I regret that an opinion of the Attorney General cannot solve all of the difficulties presented to you and the Public Service Commission relative to the matter in question. Some of the questions may of course depend upon disputed questions of fact. In so far as there may be a disputed question of fact, of course, the Attorney General could not give an opinion, but I give you my opinion as to the law governing the case in so far as the data furnished me will authorize.

The clerk or secretary of the Public Service Commission is not a state or county officer. His position is not a public office within the meaning of the constitutional or statutory provisions regulating the appointment, discharge or removal of public officers. While in a sense the position of clerk or secretary of the Public Service Commission may be considered an office and the incumbent an officer, he is an officer of the Commission and not of the state, county or municipality. His office is one of employment which the statutory provisions authorize the Commission to do. The only limitation placed upon the Commission as to the employment is as to the compensation which shall be paid the clerk or secretary. The amount of compensation being fixed at twenty-four hundred dollars per year, except in certain cases the Commission is authorized to increase the

compensation, provided the increase is approved by the Governor.

Neither the Constitution nor statutes of this state prescribe or fix any term for the clerk or secretary of the Commission. The selection of the clerk or secretary, the time of employment, the law has left to the discretion of the Commission. The Commission can consequently employ a clerk or secretary for a day, a week, a month or a year, or at will, as the Commission may see fit. The terms and condition of employment of course must of necessity depend upon the contract of employment. This contract of employment may be in writing or rest in parol. All of the terms of employment may be expressed or some may be expressed and some may be implied. The Commission employs the clerk or secretary just as any other principal or employer employs an agent, deputy or employee. Consequently the contract of employment may be whatever the parties to the contract may agree unless such agreement be in violation of law.

The Commission, like any other employer or principal, has the absolute right of dismissing any of its employees including the clerk or secretary of the Commission, with or without cause. Of course, it cannot deprive its employees, its clerk or its secretary, of their rights which they have acquired under the contract of employment, and for a wrongful discharge of the clerk or secretary the members of the Commission so wrongfully discharging him might subject themselves personally to liability or damages. Whether in any particular case an employee, the clerk or secretary of the Commission, may be discharged without liability, depends upon the expressed and implied terms of the contract of employment, and breaches of the contract of employment. If no period of service has been agreed upon, either party may terminate the employment at will, without cause and without liability. In such cases it is no breach of contract or of duty to refuse to receive further services and the refusal to accept any at all will entitle the employee to nominal damages only. Where, however, the contract of employment is based on a definite period, the employer may not terminate the contract before the end of the stipulated time without liability to the employee.

18 Ruling Case Law, Section 21, pages 510 and 511.

From the data furnished me referring to the minutes of the Commission and to the correspondence with the Governor, it would seem that Mr. White's employment as secretary or clerk of the Commission was for a year. This is confirmed by reference to a written contract entered into by and between Mr. White and the president of the Public Service Commission, which the majority of the Commission attempted to annul. If Mr. Wnite's employment was for a year and if the written agreement between him and the president of the Public Service Commission but evidences the terms of the contract of employment of Mr. White between the Commission, then, of course, the Commission could not subsequently annul this contract nor could the Commission subsequently destroy Mr. White's contractual rights by virtue of this contract. While the Commisson, as before stated, can with or without cause discharge Mr. White as clerk or secretary of the Commission, and may decline to receive his services, they can not deprive him of his contractual rights nor deprive him of his rights to compensation, provided, however, he is without fault and his dscharge was without justifiable cause. Of course, a principal or employer may discharge his agent or employee during the term of the contract of employment without liability to the agent or employee, if the agent or employee has breached his contract or employment or given the principal or employer just cause for the discharge. But if the discharge be arbitrary and wrongful on the part of the principal or employer, the agent or employee is entitled to damages as for his wrongful discharge, and in some cases the measure of the damages is the compensation which the agent or employee would have received had he fully performed his contract of employment.

Straus v. Meertief, 64 Ala. 299; 38 Am. Rep. 8.
Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep., 387.

As was said by the Supreme Court of Alabama in the case of Straus v. Meertief, 64. Ala. 299:

> "It is not a matter of doubt that when a contract is made for personal services for a particular term at stipulated wages, if the paid employee is without cause

discharged during the term, he has the right to regard the contract as broken and may immediately sue and recover all the damages resulting from its breach which he may sustain up to the time of the trial. But he is not compelled to accept the breach of his employment as termination of the contract, he may elect to treat it as continuing and keeping himself in readiness to perform the contract on his part may recover the wages due on the expiration of the term and if the wages are payable by installments, he may sue for the recovery of each installment as it becomes due."

If the position which Mr. White holds as clerk or secretary of the Public Service Commission was a public office of the state, county, or municipality, having no fixed term and the law provided that the office should be filled by appointment by the Public Service Commission, then of course, the appointing power could fix the term for which the appointee should hold office, or they could appoint for a term at the mere will of the appointing power, and in such case the appointee would accept the office with full knowledge of the law that he could be removed from office at the will of the appointing power, and consequently he would have no right to compensation or to the office after being removed by the appointing power. Such was declared to be the law by the Supreme Court of Alabama in the case of Touart v. State ex rel, Callaghan, 173 Ala. 455, in which case many authorities were cited and reviewed. The case now presented to the Attorney General, however, differs from the case of Touart v. State, above, for the reason that the officer there in question, being a county tax commissioner, was held to be a county officer within the meaning of the constitutional and statutory provisions of this state. While the position here in question, that of clerk or secretary of the Public Service Commission, is not a state, county or municipal office. The incumbent of such position is but the agent or employee of the Commission which makes the appointment. It is not a public office within the meaning of the Constitution and statutes of this state. (Sanders v. State, 187 Ala. 79, and cases cited.) A public office differs in material particulars from a public employment, as was said by Chief Justice Marshall:

"Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract expressed or implied to perform a service without becoming an officer. The term office, that is a state, county or municipal office, implies a delegation of a portion of the sovereign power to and the possession of it by the particular person filling the office. An employee merely, has none of these distinguishing features. A public agent acts only on behalf of his principals, the public, whose sanction is generally considered as necessary to give the acts performed the authority of a public act or law. An office also differs from a contract. Office involves delegation of a sovereign function. Office is created by law and not by contract. Though employment may be created by law, it is not necessarily so, but is often the creation of a contract."

The case presented is ruled by the decision in the case Sanders v. State, 187 Ala. 79; Scholl v. Duncan, 162 Ala. 196, and Harrington v. State, 200 Ala. 480. It was ruled by the Supreme Court in those cases that a public office is a public employment; but every public employment is not a public office. A public agent or public employee, of course, acts for his principal or employer. His public employment may be created by law or by contract or by both, but a public office can never be created by contract.

Mr. White's position as secretary of the Public Service Commission is in part created by law and in part by contract. The decisions in the above cases and the authorities there cited and reviewed in my judgment decide that the position which Mr. White holds is not a public office, but merely a public employment which depends, of course, upon the contract of employment.

As to whether or not the majority of the members of the Commission had just cause for discharging Mr. White, or declining further to receive his services, is not properly presented to the Attorney General for an opinion, and, of course, if it depended upon disputed facts, the Attorney General would not and should not attempt to give an opinion. But the data furnished me shows no fact which would authorize or justify the discharging of the clerk or secre-

tary of the Commission, so as to deprive him of his contractual rights.

The statute seems to vest the power and right to appoint a clerk or secretary in the Commission. The Commission is composed of three members, and a majority of the members, of course, can act for the Commission.

Yours very truly,
JAMES J. MAYFIELD,
Assistant Attorney General.

BOYS' INDUSTRIAL SCHOOL:—Juvenile delinquent committed to reformatory is not "convicted and punished," and may be granted leave of absence by superintendent of institution.

August 29, 1922.

Hon. Thomas E. Kilby,
Governor of Alabama,
Capitol.

My Dear Sir:

Your excellency has requested an opinion of this office as to the authority of the superintendent of the Alabama Boys Industrial School to grant a pupil of that institution leave of absence "to go home for a few days on his own recognizance."

The Alabama Boys Industrial School was first organized under the act of February 28, 1899, which was revised by the Code Committee of 1907, and became Sections 1954-1970 of the Code of that year. It was reorganized under the School Code of 1919 (Acts 1919, page 666) and all sections of the original codification were included in this reorganizing act. The school is incorporated and its affairs are entirely in the control of a Board of Directors. Section 4 of the reorganization act (Acts 1919 page 667) provides that the Board of Directors may make by-laws, rules and regulations, not inconsistent with the laws of the state, that shall be necessary and expedient for the government and management of the institution. Section 13 provides that from the time of the reception of any child in the institution, and during its stay, the school shall have "the exclusive care, custody and control of the child, under such rules and regulations as the Board of Directors may provide." Section 9 provides as follows:

"Any child committed to said institution under the provisions of this article shall be kept therein until he arrives at the age of twenty-one years, unless sooner dismissed therefrom by the order of the Board of Directors, or in pursuance of any by-laws of the institution, or by an order of the Governor of the State."

Under the powers above referred to the Board of Directors have adopted the following by-laws:

"The Superintendent may at his discretion or in cases of emergencies for meritorious conduct, grant leave of absence to both pupils and employees."

Such a by-law is, in my opinion, entirely consistent with the laws of the state and with the purposes and objects of the institution, and is in all probability a very necessary and proper measure to meet emergencies and offer reward for good conduct on the part of both the pupils and employees of the institution. The action of the superintendent in pursuance of such by-law, is therefore, in my opinion, fully authorized under ordinary circumstances.

It appears, however, from the acts establishing the Boys Industrial School that its pupils are composed not only of neglected and abandoned male children of the statutory age, but also of delinquent children who have violated some provision of the criminal law of the state. If confinement in the Boys Industrial School is an alternative punishment for juvenile criminals, and is to be considered in the same light as the usual punishment imposed upon adult criminals, then a conflict arises between the power of the Governor to pardon and parole, conferred by section 124 of the Constitution, and the power of the superintendent to grant a leave of absence upon recognizance, which is in effect the granting of a parole.

Your Excellency's present inquiry arises from the case of Cecil Vickers, a juvenile delinquent who upon his own confession was convicted of "distilling" by the juvenile court of Montgomery County, declared a ward of the state, and placed in the Alabama Boys Industrial School under an order of that court. If the order placing Vickers in the school was a legal punishment within the meaning of Section 124 of the Constitution, the sole power to pardon or parole

him rested in the Governor, and no legislative device, no matter how humanely conceived or conscientiously administered, can place the paroling power in any other body, board or executive officer.

It has long been recognized that the power of the Governor to remit fines and to grant reprieves, paroles, commutations and pardons, as conferred by Section 124 of the Constitution of 1901, and its predecessors, is exclusive. In the case of Haley v. Clark, 26 Ala. 439, it appeared that the sureties of a certain county officer were fined five hundred dollars as a statutory penalty for the failure of their principal to make certain reports required by law. After the fine had been imposed, the Legislature, under the guise of an act to relieve the sureties, directed the treasurer of the county to repay the sureties the sum of five hundred dollars. Upon the refusal of the treasurer to comply with the legislative command, a writ of mandamus was directed to him, which the trial court denied upon demurrer attacking the constitutionality of the legislative act. Upon appeal to the Supreme Court it was declared that the power to pardon and to remit fines had been intrusted by the organic law solely to the Chief Executive, that under the division of the government into legislative, executive and judical departments, it was beyond the power of the Legislature or any other department, to exercise the pardoning power, or to remit fines, and the ruling of the lower court was sustained, the act being unconstitutional.

However, the pardoning power intrusted by the Constitution to the Chief Executive of the state is limited to offences for which there may be conviction and punishment. M. & G. R. Y. Co. v. Peebles, 47 Ala. 317, at 328. In that case there was a litigation to remove a cloud from the title to land created by a tax sale. The Court said,

> "The power of the Governor to reprieve, commute, and pardon is confined to offences for which there may be conviction and punishment. The nonpayment of taxes is not made such an offence by the laws of this state."

Thus many penalties imposed for the nonpayment of taxes and penalties imposed in *qui tam* and similar actions are beyond the pardoning power of the Governor. The present

inquiry, therefore, turns upon the question whether or not the order of the juvenile court committing young Vickers to the care and custody of the Alabama Boys Industrial School is "conviction and punishment" within the meaning of Section 124 of the Constitution of 1901. What is legal punishment in Alabama has been declared by a statute which has now been in force over seventy years, and which was well understood before the Constitution of 1901 was adopted. This statute is the present Section 7620 of the Code of 1907. It provides in part as follows:

> "The only legal punishment besides removal from office and disqualification to hold office, are fines, hard labor for the county, imprisonment in the county jail, imprisonment in the penitentiary, which includes hard labor for the state, and death by hanging."

In 1 Wharton, Criminal Law, Section 370, it is said:

> "The constitutionality of statutes authorizing the establishment of juvenile courts and giving exclusive jurisdiction over all infantile offenders against the laws, between the ages of six and sixteen, and of statutes authorizing the commitment of such offenders, without trial by jury, to reformatories, houses of correction, industrial schools, and the like, is now too well established to admit of a doubt. In such proceedings due regard must in all cases be paid to the interests and rights of the children; but when a child is brought into court under the law in the interest and for the benefit of the child, and when the detention is manifestly for the welfare of the child, such detention will be allowed, and the child required to remain in the institution. *Such statutes are not penal in their nature, and commitment under them to public houses or institutions of the character named is not in the nature of punishment.* The provision of the statute is a provision by the state, under necessity, as *parens patriae*, for the custody and care of neglected, incorrigible, or criminally inclined children, and is intended to supply to them that parental custody and care and restraint which their welfare, and interests of the state in the welfare of the children, require, which parental custody, or the parental right to the custody, the parents have for any reason surrendered or lost."

The juvenile court of Montgomery County was organized under an act approved October 3, 1920, Acts 1920, Special Session, page 76. Section 10 prescribed the punishments which may be imposed by that court upon finding that a child of the statutory age is abandoned, neglected or delinquent, These are, that the child shall be considered a ward of the state and subject to the guardianship of the court; that it may be placed under the care and control of a probation officer; or of its parents, or some other suitable family, home, or orphanage, similar institution or corporation willing to receive it; or the Alabama Boys Industrial School; or the state training school; or the Alabama Vocational School; or other state institution.

It is my opinion that the order of the juvenile court in delinquent cases is never the imposition of a legal punishment which is subject to the pardoning power conferred by Section 124 of the Constitution to the Governor. The legal punishments defined in Section 7620 of the Code must have been well understood by the Constitutional Convention of 1901 as being the sole punishments subject to the pardoning power of the Governor. The decision of the Supreme Court in M. & G. R. Y. Co. v. Peebles, 47 Ala. 317, previously alluded to, would also, under familiar principles of construction, become a part of Section 124 as re-adopted in 1901. It is obvious that the disposition made of a delinquent juvenile by the juvenile court of Montgomery County is not legal punishment as defined by Section 7620 of the Code, and in my opinion, therefore, the orders or judgments of the juvenile court do not impose legal punishment under the criminal laws of Alabama. The pardoning power conferred by the Constitution does not therefore extend *ex proprio vigore* to the orders or judgments of the juvenile court.

It should be noted in this case, however, that Section 9 of the Alabama Boys Industrial Act, above referred to, as well as Section 1962 of the Code of 1907, gives to the Governor and to the Board of Directors the power to discharge persons committed to the care of the school. This power is derived from the act of the Legislature, and not from the Constitution, and there is nothing in the Constitution which forbids its delegation to the Board of Directors, and by them through appropriate by-laws to the superintendent of the school.

In summary, I therefore beg to advise, that in my opinion the superintendent of the Alabama Boys Industrial School, acting under the by-laws above set out, has full power, as also has the Governor and Board of Directors, to grant paroles to delinquent pupils of the institution, who have been confined therein as a substitute for criminal punishment, as well as to pupils who are confined therein solely because of necessitous circumstances. However, it is to be noted that the by-law above set out extends only to leaves of absence or paroles, and unless another by-law confers the power to dismiss or finally discharge a pupil from the custody of the school, that power rests alone in the Governor and the Board of Directors under Section 9 of the Act above set out.

Very truly yours,

MARION RUSHTON,
Assistant Attorney General.

PUBLIC SERVICE COMMISSION:—Termination of employment of J. W. Kirtland, rate clerk, and State Auditor's duty as to issuing warrant for services.

August 31, 1922.

Hon. H. F. Lee,
State Auditor,
Capitol.

My Dear Sir:

Your inquiry to the Attorney General of yesterday relative to the above matter has been by him referred to me for answer.

The law does not specifically provide nor prescribe what evidence the auditor should have to authorize or to require him to issue a warrant in all cases. It is his duty, office and function under the Constitution and statutes of this State to examine and certify accounts and claims against the State and to keep an account between the State and its Treasurer. Section 72 of the Constitution provides that no money shall be paid out of the treasury except on appropriations made by law and on warrants drawn by the proper officer in pursuance thereof.

Section 599 of the Code defines and prescribes most of the duties of the State Auditor among which is to examine and adjust the claims of all persons against the state where provision for the payment thereof has been made by law, and to draw warrants on the State Treasurer for the payment of all moneys directed by law to be paid out of the treasury in favor of the person authorized to receive the same. So the primary question as to whether or not you can issue a warrant to Mr. Kirtland in accordance with the voucher presented to your department, depends upon the fact as to whether or not the voucher represents a true and correct claim against the state which is payable out of the state treasury on the warrant of the State Auditor. If so, of course, it would be your duty to issue the warrant. If it is not such a claim the payment of which is so authorized, it would be your duty to refuse to issue a warrant.

I infer from your letter and other data furnished me that Mr. Kirtland's claim is based on Section 3 of an act "To enlarge the authority, powers and jurisdiction of the Public Service Commission" (Acts 1920, page 38). If so, this section especially provides that all money paid out under provisions of this act shall be paid out of the state treasury on warrant drawn by the State Auditor on the State Treasurer *and approved by the Governor.* The language of this section is uncertain as to whether it requires the approval of the claim by the Governor before the Auditor could issue the warrant, or whether it requires the approval of the warrant by the Governor before it should be paid. It is certain that this statute requires the approval of the Governor before any claims arising under this section of the act can be paid.

It is my opinion that it was the intention of the law makers to require claims for compensation authorized under Section 3 of the act above referred to, to be approved by the Governor rather than to require him to approve the warrant. I am informed that the contemporaneous construction placed upon this section of the act is the same as provided by Subdivision 3 of Section 562 of the Code which provides for the employment and payment of additional clerks in state departments, that is, that the compensation of such clerks must be paid on accounts stated, certified by the head of the proper department that the same is correct, and approved by the Governor. It is a rule of construc-

tion that wherever a constitutional provision or statute is of doubtful meaning, the courts will look to a contemporaneous construction placed on the provision by the officers who administer it, and I am informed that the accounts due under Section 3 of the Act of 1920, page 38, et seq., have been authenticated and certified by the heads of the departments and approved by the Governor before warrants are issued, just as is done by Section 562 of the Code. While, of course, this is not binding upon the courts, they will look to such contemporaneous construction by such officers in determining the meaning and effect of such Constitutional provision or statute.

While the statute in question does not specifically require that the claims of clerks or assistants employed under it shall be paid upon an account stated, certified by the head of the proper department, it does require the approval of the Governor. The law never requires the doing of a useless thing, and if the Governor should disapprove a claim, the payment out of the state treasury of which requires his approval, it would be useless for the Auditor to issue a warrant for its payment. As stated above it seems that the law under which Mr. Kirtland is employed does not specifically require that the account for his claim of services should be certified by the head of the proper department, as is provided by Section 562 of the Code and other provisions. It is, however, necessary that the Auditor should satisfy himself that the account or claim presented to him is a proper and just claim, payable out of the treasury upon his warrant, before he would be authorized to issue the warrant, and while there is no specific provision that the Governor should approve the account or claim before the warrant is issued, it is certain that the claim could not be paid out of the state treasury without the approval of the Governor, and if the Governor in advance of issuing the warrant should decline to approve the claim, it would seem that this would certainly be a justification for the Auditor to decline to issue the warrant, which the law expressly provides should not be paid except upon the approval of the Governor.

Very truly yours,
J. J. MAYFIELD,
Assistant Attorney General.

TRIAL TAX:—Not charged in garnishment cases, but charged in civil and criminal cases appealed to circuit court.

September 8, 1922.

Hon. Henry N. Hughes,
Clerk Circuit Court,
Montgomery, Alabama.

Dear Sir:

The Attorney General has referred to me your letter of the 31st ultimo, in which you ask to be advised whether the trial tax of $3.00 referred to in Section 4½ of the revenue bill of 1919—Acts 1919, page 284—must be taxed and collected in the following cases:

(1) In garnishment cases wherein a garnishment is issued in aid of a pending suit;

(2) In garnishment cases wherein garnishment is issued in aid of a judgment already recovered;

(3) In civil cases appealed from the Probate Court, Common Pleas Court, or other inferior courts;

(4) In criminal cases appealed from a lower court.

In an opinion rendered by Hon. J. Q. Smith, former Attorney General, in a letter to Hon. W. J. Waldrop, Clerk Circuit Court, Birmingham, Alabama, under date of November 7, 1919 (Biennial Report, Attorney General, 1918-1920, page 338), he stated he was of the opinion that where a judgment was obtained and a garnishment proceeding had on that judgment such garnishment was an ancillary proceeding, and not a new case, and that therefore the trial tax of $3.00 should not be charged in such case. Certainly if the trial tax is not chargeable in such cases, it should not be charged in a case wherein a garnishment is issued in aid of a pending suit. In each of these two classes of proceedings the garnishment is, in my judgment, a mere branch of the main case, such main case being subject to the trial tax.

As to all civil and criminal cases appealed from the probate court, common pleas court or other inferior courts, I am of the opinion that the trial tax should be collected in each of such cases. The statute requires that the tax be imposed in each case which "goes upon the docket of any circuit court in this State" without any conditions as to whether it goes upon the docket by reason of the fact that the case was originally filed in such circuit court, or was

brought into such court by appeal. The appeal is a mere right conferred by statute and it is optional with the litigant as to whether he will exercise that right. When, therefore, he sees fit to cause his case to be entered upon the docket of the circuit court either as an original proceeding in such court, or by an appeal, he brings his case within the statute requiring the payment of the tax in each case which goes upon the docket. If after a case were filed in some inferior court the law should require that it go to the circuit court and be decided there before the judgment could become final, there might be some reason for the position that the tax would not lie in such cases. However, as stated above, it is optional with all litigants as to whether a decision in an inferior court will be accepted by the litigant on the one hand, or whether he will exercise the right of appeal on the other.

I therefore advise that you collect the trial tax in all cases coming to your court by appeal but that you do not collect the tax in garnishment proceedings such as are referred to above.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

PROHIBITION LAWS:—Sale of copper from destroyed stills.

September 8, 1922.

Hon. William H. Holcombe, Jr.,
Sheriff,
Mobile, Alabama.

Dear Sir:

The Attorney General has referred to me your letter of the 5th instant with reference to certain stills which you have in your possession in the county jail building which have been rendered useless for service by you.

Acts 1919, page 12, Section 12 provides that all appliances which have been used or are ready to be used for the purpose of distilling or manufacturing any prohibited liquors or beverages are declared to be contraband, and no one shall have any property rights in the same, and when found by the sheriff or other officer in an effort to enforce the prohibition laws of the State, the same shall be by said

officer "at once summarily destroyed and rendered useless for service." It is further provided that the owner of the distillery or plant or any person permitting the same to exist on the premises shall forfeit to the State of Alabama "all property used in connection with said illegal plant" together with the building and lots or parcels of ground constituting the premises on which the unlawful act is performed or permitted to be performed. A still is "property used in connection with said illegal plant." The statute further provides that the forfeiture may be enforced by a bill filed on the equity side of the circuit court of the county in which the property is located, etc.

It is therefore apparent that the only legal method by which such stills as are referred to could be sold by you is the method set forth in the statute, which is the filing of a bill on the equity side of the circuit court.

I am therefore of the opinion that you have no legal right to sell the copper in these stills to a junk dealer after having cut the copper into sheets or strips unless an order of court shall have been obtained authorizing the sale.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

TAXATION OF CORPORATIONS:—Liability of non-resident corporations for doing business in Alabama without license or permit.

September 14, 1922.

To His Excellency,
Thomas E. Kilby, Governor of Alabama,
Montgomery, Ala.

My Dear Governor:

The within correspondence relating to above matter has been referred to me by the Attorney General for answer. I fully concur in the conclusions reached by Mr. Jno. S. Mooring, Chairman of the State Tax Commission, as expressed in his letter to you of September 12, 1922. Foreign corporations of course, are not required to obtain a license or to pay for privilege or license taxes unless they are doing local business in this State. If their transactions and dealings in this State are a part of interstate commerce, they of course are not liable as for a State license or for State

taxes. The constitution and statutes of this State only require them to obtain a license and to pay privilege or license taxes when they are doing intra-state business, but do not and cannot require such license or taxes for doing an interstate business.

Whether a given foreign corporation is doing an intra- or inter-state business is primarily a question of fact and not of law and the question, of course, depends upon the facts and circumstances of each particular case. It has been repeatedly decided by the Supreme Court of the United States that a foreign corporation is not doing an intra-state business or a local business in a given State where it merely has an agent, commonly called a drummer, who solicits orders within the given State, forwards the orders to the non-resident corporation and the orders are there accepted or rejected, and if accepted the goods are shipped direct from the non-resident corporation to the purchaser. Such transactions are held to be a part of interstate commerce and not liable for State taxes. However, where a non-resident corporation sells its goods to wholesale dealers who in turn sell to retail dealers and the non-resident corporation sends an agent or drummer who takes orders from retail dealers and the goods are shipped from the non-resident corporation to the wholesale dealer and charged to him, and the wholesale dealer in turn charges the goods to the retail dealer, the Supreme Court of the United States has held that such transaction constituted a local or intra-state business and rendered the foreign corporation liable for the license or privilege tax for doing business in a given State in which the goods were sold and paid for. Of course if an agent of a non-resident corporation commonly called a drummer should have the power to make the sale in this State and did make it and collect the money, the purchase price of the sale, that would be doing business in this State.

The case of Cheney Brothers v. Mass., 246 U. S. 147, reviews a number of transactions by a number of corporations in the State of Massachusetts holding that some were liable as to the privilege and license tax imposed by the State of Massachusetts and that others were not. This case, however, like all others, shows clearly that it is always a question of fact and that no general rule of law can be announced

which would cover every case. The question is, is the foreign corporation doing a local or intra-state business or is their act in each case merely a part of interstate commerce? In that case the Supreme Court of the United States held that where a tax was imposed by a Massachusetts statute upon a foreign flouring mill corporation which employed salesmen to travel in Massachusetts and to induce local retailers to purchase flour from the foreign corporation through local wholesale dealers representing such foreign corporation, it was doing business within the State of Massachusetts and liable to the tax. But it also held that where a foreign corporation maintained a local selling office in Massachusetts in which only samples of goods were kept and from which samples its salesmen solicited orders merely which were subject to the approval or disapproval of the home office, and if accepted the goods were shipped direct to the purchaser, this was interstate business and not subject to the tax. It also held in the case of a foreign corporation which kept type-setting machines in the State of Massachusetts and sold the identical machines to Massachusetts purchasers, that this was intra-state business and subject to the Massachusetts tax.

Yours very truly,
JAMES J. MAYFIELD,
Assistant Attorney General.

CONSTRUCTION OF STATUTES:—Local laws attempting to increase salaries of certain officers of Colbert county unconstitutional. Officers may receive increased compensation when population of county has increased.

September 19, 1922.

Hon. Chas. E. McCall,
Chief Examiner of Accounts,
Capitol.

Dear Sir:

The Attorney General has requested me to reply to a request for an opinion endorsed upon letter from Mr. G. C. Dean, Assistant Examiner of Accounts, to you, written at Tuscumbia under date September 10th on the subject of compensation of the members of the court of county commissioners, judge of the county court and the deputy solicitor.

The first paragraph of Mr. Dean's letter reads as follows:

> "Please refer to general and local acts, Special Session 1920, pages 180, 181, and advise me whether or not the increased pay provided for the court of county commissioners, and judge of probate as county court judge, is a legal charge against Colbert County."

If the probate judge and the members of the court of county commissioners as referred to were in office on October 5, 1920, the date on which the two Acts were approved, they could not legally receive the increased compensation provided for in these Acts which stipulate that the members of the court of county commissioners shall receive $6.00 per day while attending any term of the court or while occupied in the discharge of any other duties in connection with the office, and 5 cents per mile while going to and returning from the sessions of the court or other place in the county in the discharge of their duty, and that the judge of the county court shall receive a flat salary of $1,200 per annum. By the provisions of an Act approved August 25, 1909, Acts 1909, page 157, amending Section 3322 of the Code the compensation of the members of the court of commissioners is fixed at $3.00 per day and under the provisions of an Act approved September 18, 1915, Acts 1915, page 603, the compensation of judges of county courts in this State is fixed on a sliding scale based on population, the maximum salary therein provided being $600 per year. It will be noted therefore that the local acts of 1920, referred to provide for an increase in compensation as to both the judge of the county court and the members of the court of county commissioners. As stated above any one of these officers who was in office on October 5, 1920, cannot receive this increase in compensation. The reason that this increase in compensation cannot be legally paid is that there is an inhibition against it contained in Section 281 of the Constitution of Alabama which provides that "the salary, fees or compensation of any officer holding any civil office of profit under this State or any county or municipality thereof shall not be increased or diminished during the term for which he shall have been elected or appointed," and by Section 68 of the Constitution it is provided that the legislature shall have no power "to increase or decrease

the fees and compensation to public officers during their terms of office."

The sections of the Constitution last referred to do not render the Act invalid but do operate to prevent these officers from receiving the increase in compensation during the term for which they were elected or appointed, provided they were in office when the Act became effective.

In State ex rel. Thomas v. Gunter, 170 Ala. 165, the Supreme Court held that Section 68 of the Constitution applies to incumbents at the time of passage of the Act, and not to persons taking the office after the enactment of the particular legislation affecting the office.

I am inclined to the opinion that each of these Acts is unconstitutional when viewed in the light of Section 105 thereof which provides that no local law except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law or when the relief sought can be given by any court of this State. In fact, it was so expressly held as to the judge of the county court in Acuff v. Weaver, 86 South. 167, wherein a local act of Shelby County which provided for a compensation of $1,200 per year to the judge of the county court was under consideration, it being held that Acts 1915, page 603, supra, a general law, covered the subject matter of the local Act and that the local Act could not therefore stand. However, it may be said that the Supreme Court in the case of Board of Revenue of Jefferson County et al v. Kayser, 88 South. 19, and Jackson v. Sherrod, 92 South. 481, has given to Section 105 of the Constitution a much more restrictive interpretation than was placed upon it in the case of Acuff v. Weaver. In the two cases last mentioned, however, the decisions proceed upon the theory that the subject matter of the local Acts under consideration were not reached by the general law. This cannot be said to be true as to the matters here under consideration, since a flat compensation is provided for all of the officers in question throughout the State and the local Acts undertake to provide for a compensation of these officers in Colbert County which is approximately double that allowed to similar officers in other counties of the State.

As to the members of the court of county commissioners, I am inclined to the opinion that these Acts were also viola-

tive of Section 96 and 104, subdivision 24, of the Constitution. This, however, is not true as to the judge of the county court since his compensation is on a salary basis and these sections have been construed as not applying to officers receiving a fixed salary.

Section 96 provides that the legislature shall not enact any law not applicable to all the counties in the State regulating costs and charges of courts or fees, commissions, allowances of public officers, and the legislature is prohibited under the provisions of Section 104, subdivision 24, from passing a local law "creating, increasing or decreasing fees, percentages or allowances of public officers."

Mr. Justice Sayre in the case of Jackson v. Sherrod supra, treats these two provisions of the Constitution above referred to together and states that they cover practically the same, if not identical grounds. He holds that these sections are for the protection of parties against whom costs, fees, or allowances, commissions or percentages are charged, and this protection to the extent intended is insured by the requirements of invariable uniformity throughout the State. In this instance Colbert County would not be protected under the local Act providing for the payment to the members of the court of county commissioners of $6.00 per day when such officers in other counties are authorized under the law to collect only $3.00 per day.

The next inquiry contained in the letter referred to is whether the county solicitor who was appointed in January 1919, under Acts of 1915, page 820, for a period of four years and is drawing compensation according to the population of the county, which was about 27,000 at the time the appointment was made, is entitled to an increase of salary during his term of office provided there has been an increase in the population during said term.

The 1915 Act referred to provides for the compensation of deputy solicitors according to a sliding scale based upon the population of the county, and I am of the opinion that where the population of a county shall have increased during the incumbency of a deputy solicitor to such extent as to put it within a class having a greater population and therefore a greater salary, attached to the office, such solicitor is entitled to receive the additional compensation. This view is in line with an opinion rendered by Hon. Harwell G. Davis, Attorney General, under date of August 3, 1921,

in a letter to Mr. F. E. Poole, Circuit Solicitor, Grove Hill, Alabama, in which he states that when a county solicitor is appointed he takes the office with the knowledge that if the census figures should increase or decrease, his salary would likewise be increased or diminished.

Yours very truly,
LAMAR FIELD,
Assistant Attorney General.

NOTE:—In addition to the foregoing 237 opinions, the Attorney General rendered to officers of the state 185 opinions, which have not been printed, being of local, limited, or temporary application.

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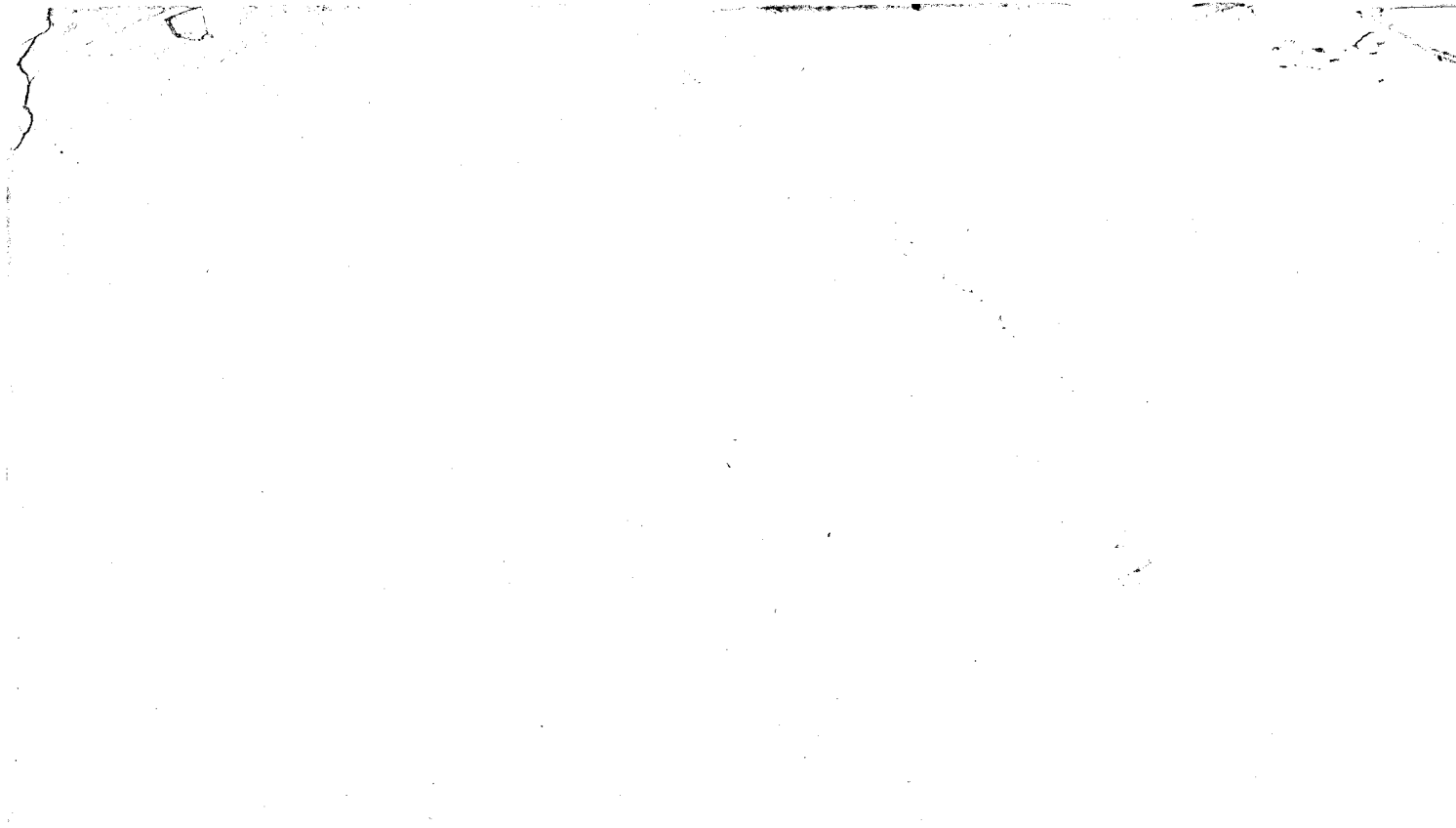
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